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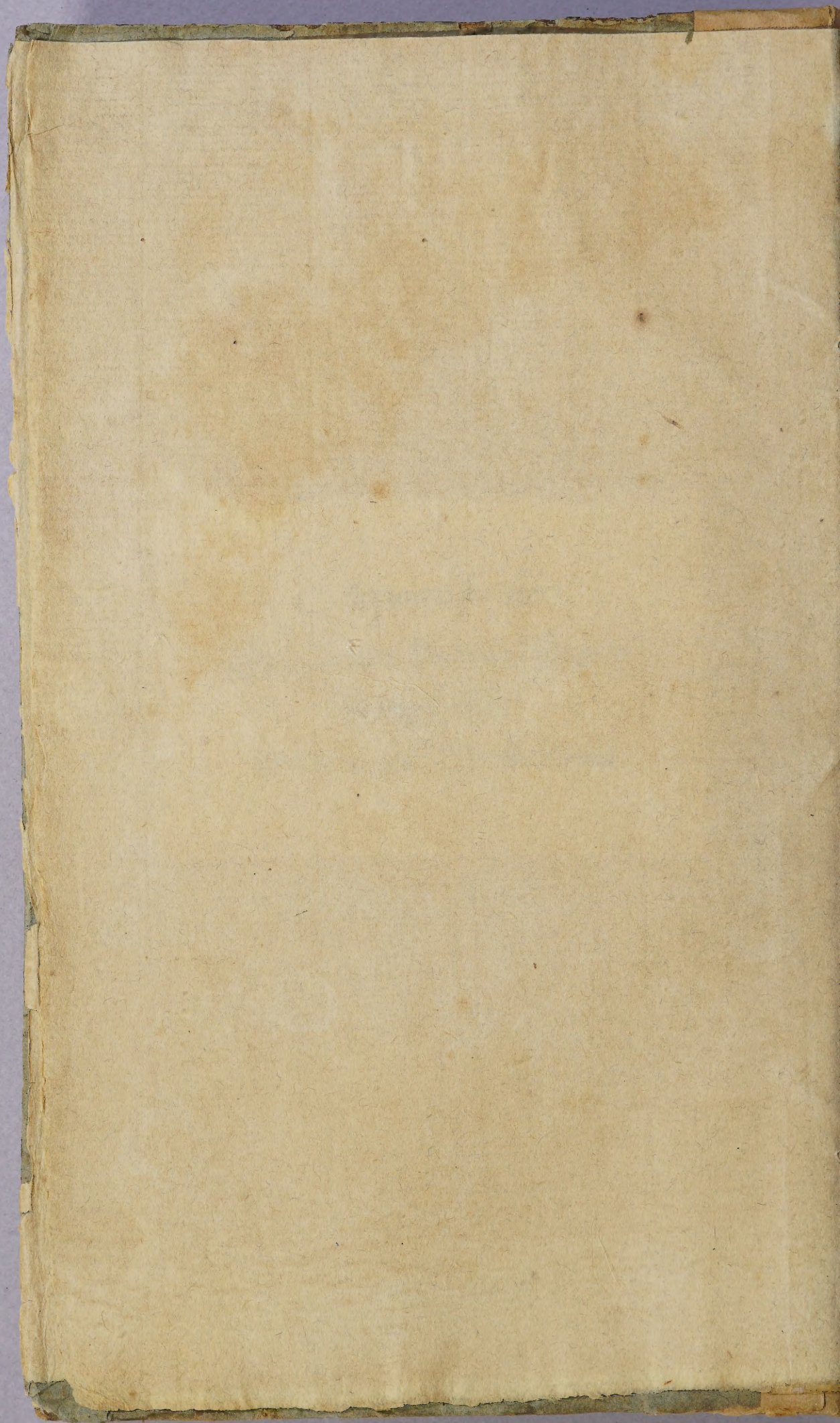
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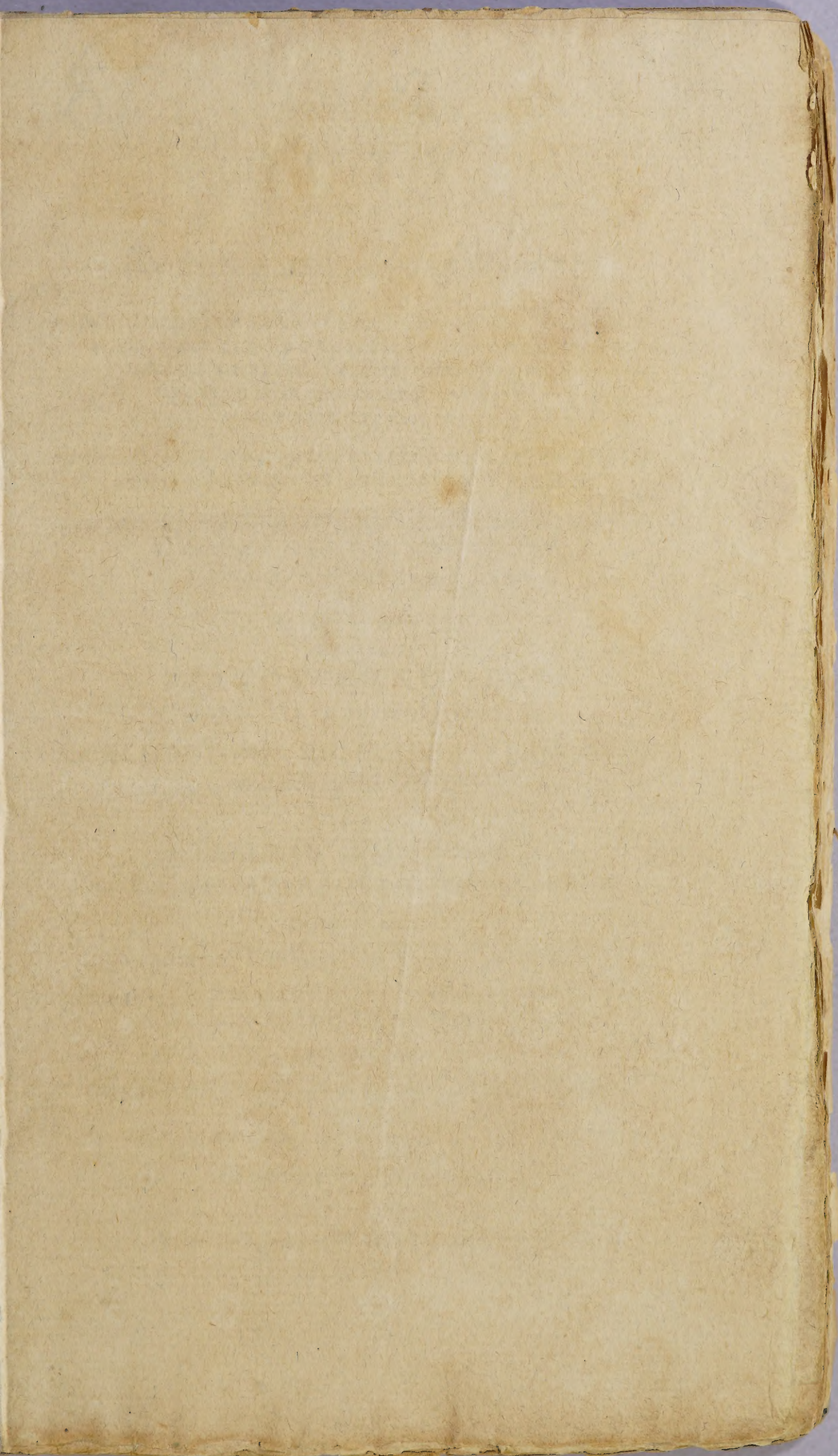
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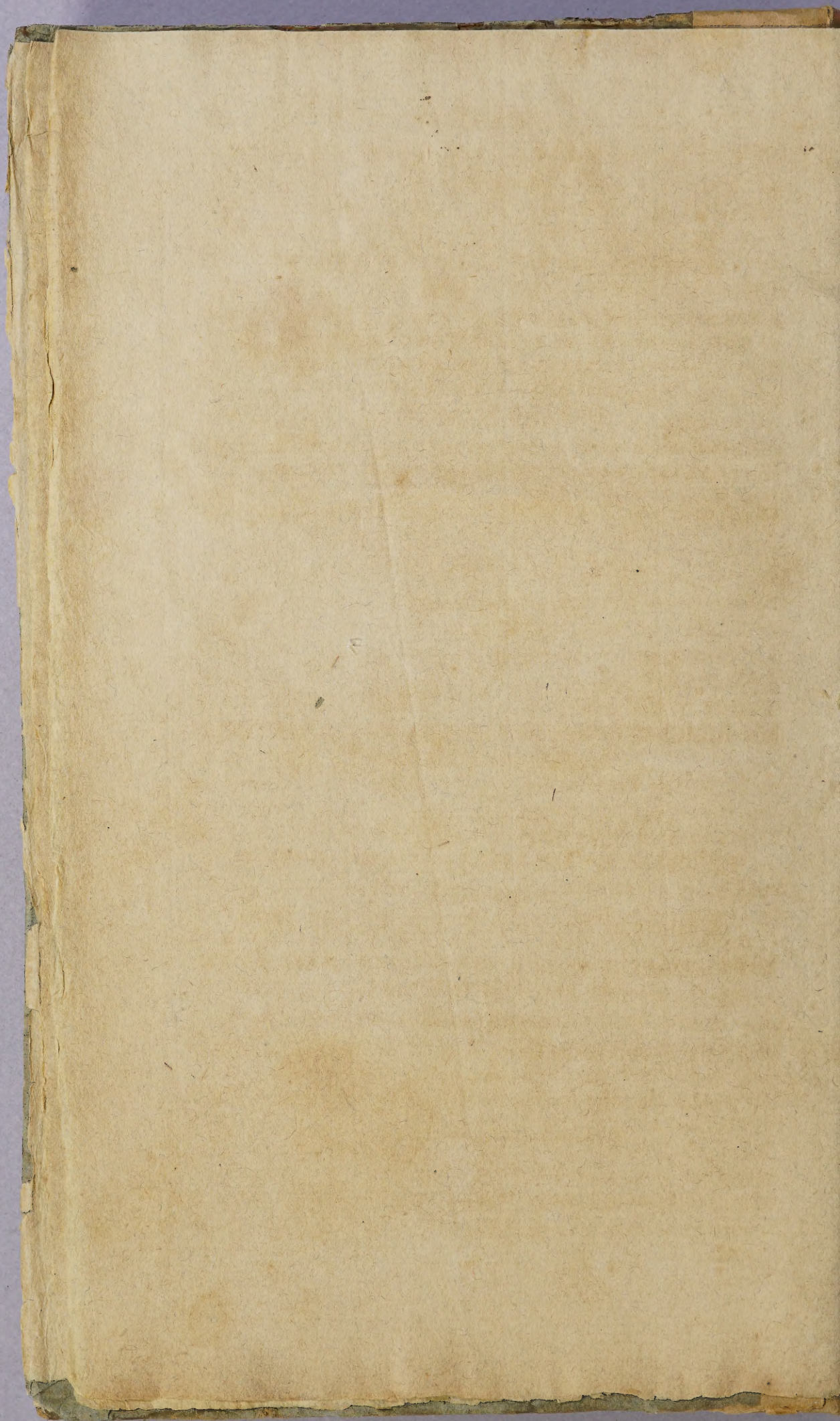
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John Vaughan
THE
D U T Y

OF

Executors and Administrators:

POINTING OUT, IN A PLAIN AND FAMILIAR MANNER, HOW
EXECUTORS ARE TO PROCEED IN THE PROBATE OF
WILLS, GETTING IN THE EFFECTS, AND
PAYING THE DEBTS AND LEGACIES
OF THEIR TESTATOR:

SHEWING ALSO WHO ARE ENTITLED BY LAW TO BE THE
ADMINISTRATORS OF AN INTESTATE PERSON:

With full and clear Directions to a Man's Relations how his Estate will
be distributed among them, according to the
LAWS OF SOUTH-CAROLINA.

To which are prefixed,

ALL THE

STATUTES AND ACTS

RELATIVE TO THESE SUBJECTS,

Mr. BLACKSTONE's RULES FOR INTERPRETING
WILLS AND DEEDS,

AND

A TABLE OF INHERITANCE,

WITH A CONCISE AND EASY EXPLANATION THEREOF.

To which is added,

A variety of Precedents of Wills, Codicils, &c.

WITH INSTRUCTIONS FOR EVERY PERSON TO MAKE, ALTER
AND REPUBLISH HIS WILL;

AND LIKEWISE,

All the Forms made use of in the Court of Ordinary.

Lex (de quâ agimus) est fons æquitatis.

CICERO.

NEW-YORK:

Printed by T. and J. SWORDS, No. 99 Pearl-Street.

1797.

DUTY

AND THE DUTY OF A MAN IN A
MILITARY SERVICE

BY THE REV. J. H. STODOLSKY

OF THE UNIVERSITY OF CHICAGO

CHICAGO: THE UNIVERSITY OF CHICAGO PRESS

1914

THE UNIVERSITY OF CHICAGO PRESS

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P R E F A C E.

THE difficulty of obtaining a just idea of the office of an executor and administrator in this state, and of the several duties respectively incumbent on them, having been frequently mentioned in conversation in my presence, I conceived that a work of this kind would prove useful to many persons on several accounts.

Being persuaded, by the many inquiries made respecting the objects and duties of this station, that there was a very laudable desire of improvement in many of my fellow citizens, I resolved to throw my mite into the general fund of information: I determined, by my endeavours, to attempt a removal of the veil of ignorance and obscurity from the minds of those who were willing and desirous of receiving assistance and benefit, and not to let them wander any longer in the uncultivated regions of doubt and uncertainty. It occurred to me, likewise, that there were many persons who had a small portion of leisure on their hands, and who would not be altogether prevented, by their other avocations, from dedicating some part of their time to reading; that others, possessed of small fortunes, were not willing or able to incur the expence of purchasing as many books as would be necessary to give them a full and precise knowledge of the several functions which, in these respective offices, they would be under the necessity of putting into practice; and that even such persons whose pecuniary abilities might justify them in purchasing the variety of authors who have treated of the several different branches of the duties of executors and administrators, would not be able, without the friendly assistance of professional men, to direct their pursuits in that particular study; neither could they attain any considerable degree of information in that space of time which they might be willing to devote to such a purpose, or to render their progress easy and beneficial at the same time to themselves: and further, that such persons as have a moderate independence of fortune would scarcely be induced to submit to the drudgery of turning

over and recurring to a number of voluminous law treatises and reports, and making those assiduous researches with as much perseverance as those who are in the habit of doing so from their professional situation in life, and whose duty to their clients demands frequently a long, painful, and nice investigation. With these impressions I flattered myself, that if the different materials that lay scattered in the several law authorities were collected into one body, and properly digested, that it would be an acceptable work to the man of leisure, who might undertake to peruse one octavo volume; that the price of it would be no object to those even of small fortunes; and that it would assist the researches of those gentlemen of affluence who might be induced to look into the original reporters. This book, containing only an abstract of the cases quoted, with the dictums, or judgments of the court, unsupported by their reasoning thereon, cannot be supposed to give so full a view of every subject as the author from which they are abbreviated. Whoever, therefore, is deeply interested in the events of very large and rich estates, would do well to go further than these pages; which, however, will prove a sure and, I hope, a successful guide to every person, of whatever description, who shall undertake to consult them.

The different subjects of these chapters are of as general concern as universal utility, in which the rich and the poor are continually called to exercise those employments which their testator, or the law, may invest them with: and as there are few men who are not at one time or other called upon as witnesses to the last disposition of the earthly affairs of expiring persons; and as it sometimes happens that those who are in full health are taken so suddenly ill, that their friends have not time to send for a professional man to make a draught of the last will of the unfortunate sufferer, and that they are unacquainted with the common forms of executing a deed of so much importance; it therefore becomes the duty, and very frequently is the interest, of those who are the sorrowful companions of a departing friend, to qualify themselves, by learning the general principles, and some of the more ordinary rules of this part of the law, that they might be able to perform an office which so commonly falls to

the lot of almost every one in the course of his life, and are incapable either of drawing up such an instrument or directing the execution thereof. But, although this may be considered so general a duty as that it ought to have no small degree of influence upon the greater part of the community, yet is it more particularly incumbent on those who administer the consolation of the gospel to the sick and deceased, and also on the practitioners of physic, who are most frequently the mournful attendants of a death-bed patient, to pay a more than common attention to it.

Neither should it be considered as foreign to the more humble, but not less necessary and useful, office of those females who are occasionally called upon to attend and assist the sick, that they should acquire a knowledge of those formalities which are requisite to make a good will; and as they are perhaps the most convenient, so they are very frequently the only or the most proper persons to become witnesses to last testaments, particularly in cases where the sanity of the testator is called in question.

Those who have so mean an opinion of feminine abilities as to consider them incapable of acquiring such a degree of information as would enable them to prove useful in any art or science whatever, I would refer to the female practitioners of the obstetric art, in which they have given repeated proofs of their being as well qualified to assist the throes of labouring nature as the contrary sex, notwithstanding the boasted pre-eminence of masculine sense, and men being made of more perfect materials, and being more immediately derived from the hand of the Divinity. The truth is, that enough may be learned with very little attention, and retained by a very ordinary capacity, to qualify such persons to write a will, and direct the legal execution thereof. It is not required of them to ascertain the difference between contingent remainders or executory devises, nor to investigate the manifold duties occurring in the management and administration of a large estate *after a will has been properly executed*. But they might surely learn, without much difficulty, that a will of lands must be in writing, and tested by three witnesses, who need not know that the paper they are signing is a will; that they need not see a testator sign the paper; neither need he sign it, if some other person is authorized so

to do for him; that it is not necessary for the three witnesses to sign at the same time, nor in each others presence; *but that when they do sign they must individually do so in the presence of the testator*; that is, in such a situation that he might see them subscribe their names. That to a will of personalty there need not be any witnesses, if it is in the hand-writing of the testator, and that any other person may write it for him, if it can be proved that he authorized it.

If such rudimental axioms as the above are fixed in the mind, and which there can be no doubt they might with ordinary attention, I see no reason why every individual in this country might not acquire this knowledge, which would certainly prove useful and beneficial to himself and his fellow citizens. I shall, however, have performed my proportion of this duty, by laying before them the necessary materials for obtaining such an acquisition, and by recommending to them also an attentive and frequent perusal of these sheets.

Since the passing of the primogeniture law a work of this nature appeared to be more necessary than before, and has become an object of more serious attention; for, since this act has repudiated the old absurd principles of the English law of bastardizing all a man's children except the eldest son, or the issue of such son, and has made many other considerable alterations therein, and yet has not adopted altogether the rules by which the distribution of an intestate's estate takes place under the civil law, it seems necessary that the doctrines contained in that act should be elucidated, by a full and familiar explanation, for the benefit and advantage of the citizens of this country. To point out, therefore, the distinctions embraced by the act of assembly, and the deviations from the English and Roman laws pursued in that act, has been one of the most essential objects meditated in the course of this publication.

Having undertaken this task, I now promulge the result of my labours, and have endeavoured to make every thing so plain in the whole work as to be of advantage to every citizen of this state: and that it might be the more perfect, I have prefixed Mr. Blackstone's rules for interpreting wills and deeds; I have inserted, in the body of the work, a table of inheritances, with an exposition there-

of; and have added a various number of precedents of wills, codicils, &c. and a copy of almost all the forms made use of in the ordinary's office. And as it would be necessary to examine sometimes the different statutes, and the fundry acts of assembly which have been passed relative to the duty of executors and administrators; and as it is not every estate which might be able to afford a copy of the public laws to the person qualifying as executor or administrator, I thought it adviseable to prefix them to the present sheets, which, comprising in one body every thing relative to these subjects, would altogether make this compilation entirely complete.

I cannot quit this subject without expressing my concern upon the feeble state of the court of ordinary: as it is not a court of record, it does not possess the usual powers of tribunals of justice, and therefore has not authority to punish persons for neglecting or refusing to obey its process, for disregarding its jurisdiction, or for setting its decrees at defiance: formerly, indeed, the ecclesiastical thunder was hurled at the disobedient, and he was soon reduced, by the mere operation of apprehension, to submit to the decrees of this once powerful court. So much indeed were persons intimidated by these anathematical censures, that I believe only one occasion has been offered in this country, from its first settlement to the expiration of the British government in this state, for the ordinary to proceed to the greater excommunication. The case was this:—* *In the year 1765 Gov. Bull, in his character of ordinary, summoned Joseph Ash, (who had administered upon the estate of Cato Ash) at the instance of the guardians to the children of the intestate, to appear, account for his administration, and pay the balance into the hands of the guardians; and, upon his non-compliance with such summons, passed sentence of the greater excommunication against him. This decree brought Ash before the court in eight days thereafter, and upon motion*

* Excommunication is of two kinds. By the *lesser*, the offender is deprived of the use of the sacraments and divine worship, which sentence is passed by the ecclesiastical judge, on such persons as are guilty of obstinacy or disobedience in not appearing upon a citation, or not submitting to other injunctions of the court. By the *greater* excommunication, in addition to the above-mentioned penalties, the offender is also deprived of the benefit of the society and conversation of the faithful. *Johns. 168.*

of Mr. Pinckney, in his behalf, he was absolved from the sentence; Mr. Rutledge, who appeared for the guardians, consenting thereto, on his paying the fees and expences incurred by his contumacy: after which he immediately produced his accounts. Since, therefore, the good sense of the people of this country has wrested the spiritual jurisdiction of this court out of the hands of the episcopal clergy, and has disarmed it of the ecclesiastical censures which were wont to alarm, intimidate, and render all the members of the community submissively obedient, the legislature should adopt it entirely as a court of temporal jurisdiction, and, by interposing their authority, give them the necessary powers of enforcing obedience to their process and decrees, and sanction the exercise thereof by an express law. A court without power of coercing persons necessarily wanted, to attend, or to pay obedience to its decrees, is a solecism, or phenomenon seldom seen in legal history: I hope, therefore, to find this defect remedied, and that at the same time the courts of common law may be absolutely invested with the *right* of entertaining suits for legacies, instead of driving the parties, at a much more considerable expence, into the court of equity. This is a real and serious subject of complaint, and as the people are impressed already with perhaps an ill-founded jealousy of this court, the advocates thereof would do well to remove those causes which actually are unnecessarily injurious to the interests of the citizen, as in this present case I have mentioned. The rule is an excellent one, that justice shall not be deferred to any man; but if the expences of a court are so great as to deter men from seeking redress therein, justice is as completely denied them as if there was no court in which they could obtain their right. Some attention should be paid by the legislature to the *possessions in general* of the inhabitants of the country at large, and the expences of the courts of justice should be proportioned to their means as well as to those of the richer sort: but this I submit to the wisdom and patriotism of the legislature, who are too well acquainted with the rights of man to prefer the interests of one set of citizens to those of another.

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The following act was passed too late by the Legislature to be incorporated into this work; it is, however, added, for the purpose of rendering the book as complete as possible.

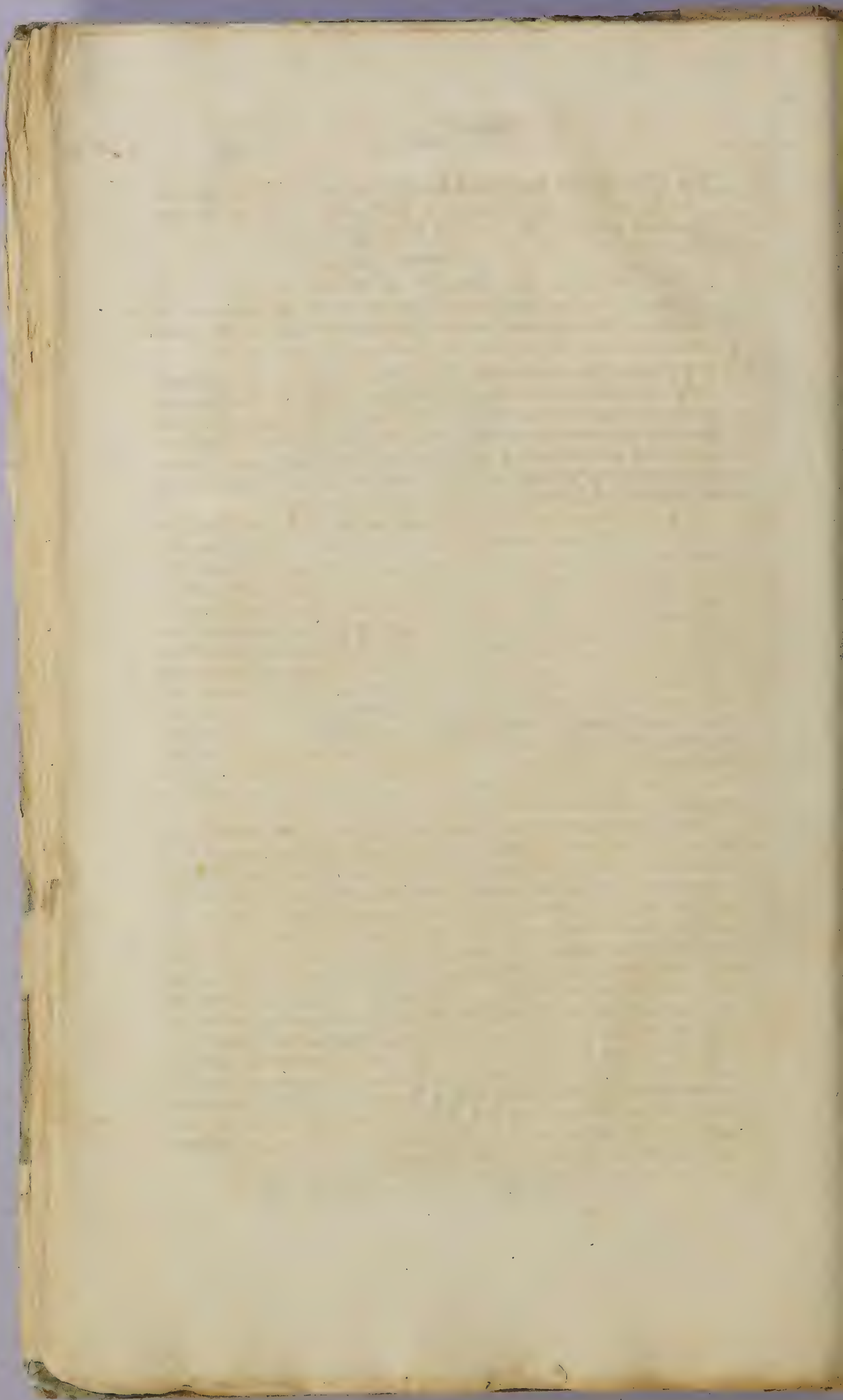
An Act to amend an Act, entitled, "An Act for the Abolition of the Rights of Primogeniture, for the giving an equitable Distribution of the Estate of Intestates, and for other Purposes therein mentioned," passed the 19th Day of February, in the Year 1791.

WHEREAS it hath been adjudged by the courts, upon the construction of the aforesaid act, that in cases in which persons die intestate, leaving no wife or children, or lineal descendant, but leaving a father or mother, although such intestate also leave brothers and sisters, or brother and sister, or brother or sister, one or more, that the father or mother is entitled to receive the whole estate, to the exclusion of such other of his or her kindred, aforesaid;

Be it therefore enacted, That from and after the passing of this act, in all cases in which any person shall die intestate, leaving neither wife, child, or children, nor lineal descendant, but leaving a father or mother, and brothers and sisters, or brother and sister, or brothers or sisters, one or more, that the estate, real and personal, of such intestate, shall be equally divided amongst the father, or, if he be dead, the mother, and such brothers and sisters as may be living at the time of the death of such intestate, so that such father, or mother, as the case may be, and each brother and sister, so left living by the intestate, shall each take an equal share of his estate, real and personal: *Provided always,* that the issue, if any, of any deceased brother or sister, if more than one, shall take amongst themselves, the same share which their father or mother, if living, would have taken; and if but one such issue, then he, or she, shall take the share, which his or her father, or mother, would have taken if living.

And be it further enacted, That the sheriff of every district in this State, shall, before he exposes any lands or tenements, which he may be directed to sell, by virtue of any execution or mortgage, publicly advertise the same, three weeks, immediately previous to the sale day, or days, on which he means to expose the same for sale; and the sheriff of every district in the said State, shall, before he exposes such personal property, goods, or chattels, as he may be directed to sell, publicly advertise the same, fifteen days, immediately previous to the sale day, or sale days, on which he means, or is directed, to expose the same for sale; and such advertisement shall be in one or more of the gazettes, in cases where the lands, or other property, which shall be for sale, should the same be in the districts where gazettes are printed; and where there are no gazettes printed, the notice, or notices, shall be put up at the Court-house door, and two other public places in the district, one of which shall be in the neighbourhood of the said property so to be sold; any law, or laws, usage, or customs, to the contrary hereof, in any wise, notwithstanding.

Passed the 16th day of December, in the year 1797.



*Statutes of Great-Britain made of force in this State, and the
several Acts of Assembly, relative to the Office and Duty
of Executors and Administrators.*

A. D. 1285. 13 Ed. 1. c. 19.

The Ordinary chargeable to pay Debts as Executors.

‘ WHEREAS, after the death of a person dying intestate, which
‘ is bounden to some other for debt, the goods come to the
‘ Ordinary to be disposed; (2) the Ordinary from henceforth shall be
‘ bound to answer the debts as far forth as the goods of the dead will ex-
‘ tend, in such sort as the executors of the same party should have been
‘ bounded, if he had made a testament.’

A. D. 1330. 4 Ed. 3. c. 7.

*Executors shall have an Action of Trespass for a Wrong done
to their Testator.*

“ ITEM, Whereas in times past executors have not had actions for
“ a trespass done to their testators, as of the goods and chattles of the
“ same testators carried away in their life, and so such trespasses have
“ hitherto remained unpunished;” ‘ it is enacted, that the executors in
‘ such cases shall have an action against the trespassers, and recover
‘ their damages in like manner as they, whose executors they be, should
‘ have had if they were in life.’

A. D. 1350. 25 Ed. 3. st. 5. c. 5.

*Executors of Executors shall have the Benefit and Charge of
the first Testator.*

‘ EXECUTORS of executors shall have actions of debts, accompts,
‘ and of goods carried away of the first testators, (2) and execution of
‘ statutes merchants and recognizances made in court of record to the
‘ first testator, in the same manner as the first testator should have had
‘ if he were in life, as well of actions of the time past, as of the time
‘ to come, in all cases where judgment is not yet given betwixt such
‘ executors; (3) and that the same executors of executors shall answer
‘ to other of as much as they have recovered of the goods of the first
‘ testators, as the first executors should do if they were in full life.’

A. D. 1357. 31 Ed. 3. st. 1. c. 11.

*To whom the Ordinary may commit the Administration of the
Goods of him that dieth intestate. The Benefit and Charge
of an Administrator.*

‘ IN case where a man dieth intestate, the ordinaries shall depute the
‘ next and most lawful friends of the dead person intestate, to admi-
‘ nister his goods; (2) which deputies shall have an action to demand
‘ and recover, as executors, the debts due to the said person intestate,

B

‘ in

‘in the king’s court, for to administer and dispend for the soul of the dead; (3) and shall answer also in the king’s court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. (4) And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come.’

A. D. 1430. 9 H. 6. c. 4.

An Idemptitate nominis maintainable by Executors, &c.

“ITEM, For that before this time many outlawries have been pronounced against divers of the king’s liege people, as well before the statute of additions, made at *Westminster* the first year of king Henry the fifth, father to our lord the king that now is, as sithence, in respect of which outlawries, the bodies of other persons having such and like names as they had which were outlawed indeed, have been taken and imprisoned, and their goods and chattels for this cause seised by the escheators of the king and his noble progenitors: (2) And although that by the common law of the realm a writ of *idemptitate nominis* hath been maintainable for the same person, which, in the form aforesaid, was molested and grieved; nevertheless, if any person of the said lieges, having like name as any other person of the same liege people which was outlawed in deed, had made his executors, and died, often it happened, that by malice and subtle imaginations the goods and chattels of such testator, which had the same name as he had which was outlawed in deed, were seised and escheated to the hands of our lord the king, and of his progenitors, in retardation of the execution of the testament of every such testator, for the doubt which hath been, whether any executors may, by the common law, have a writ of *idemptitate nominis* or not.” (3) ‘Wherefore, to take away and remove all such ambiguities and doubts in this case hereafter, of the assent and advice aforesaid, and at the special request of the said commons, it is ordained and established by authority of this parliament, that a writ of *idemptitate nominis* be granted, and made good and maintainable for the executors of every testator, to the same effect that the same action of *idemptitate nominis* was maintainable before this parliament, for any person himself, which was or might have been molested or grieved because or by colour of any such outlawry. (4) And that this ordnance shall have relation and force, by authority aforesaid, for the executors of every testator, as well of every outlawry pronounced against any person at any time before this parliament, as of all manner of outlawries to be pronounced against any person in time to come.’

A. D. 1529. 21 H. 8. c. 4.

The Sale of Lands by Part of the Executors, lawful.

‘WHERE divers sundry persons before this time, having other persons seised to their use of and in lands and other hereditaments, to and for the declaration of their wills, have, by their last wills and testaments, willed and declared such their said lands, tenements, or other hereditaments,

hereditaments, to be sold by their executors, as well to and for the payments of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up and advancement of their children to marriage, as also for other charitable deeds to be done and executed by their executors for the health of their souls. (2) And notwithstanding such trust and confidence so by them put in their said executors, it hath oftentimes been seen, where such last wills and testaments of such lands, tenements, and other hereditaments, have been declared, and in the same divers executors named and made, that after the decease of such testators some of the same executors, willing to accomplish the trust and confidence that they were put in by the said testator, have accepted and taken upon them the charge of the said testament, and have been ready to fulfil and perform all things contained in the same; and the residue of the same executors, uncharitably contrary to the trust that they were put in, have refused to intermeddle in any wise with the execution of the said will and testament, or with the sale of such lands so willed to be sold by the testator. (3) And forasmuch as a bargain and sale of such lands, tenements, or other hereditaments, so willed by any person to be sold by his executors after his decease, after the opinion of divers persons, can in no wise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named to and for the same; (4) by reason whereof, as well the debts of such testators have rested unpaid and unsatisfied, to the great danger and peril of the souls of such testators, and to the great hinderance, and many times to the utter undoing of their creditors: (5) As also the legacies and bequests made by the testator to his wife, children, and for other charitable deeds to be done for the wealth of the soul of the same testator that made the same testament, have been also unperformed, as well to the extreme misery of the wife and children of the said testator, as also to the let of performance of other charitable deeds for the wealth of the soul of the said testator, to the displeasure of Almighty God. (6) For remedy whereof, be it enacted, That where part of the executors named in any such testament of any such person so making or declaring any such will of any lands, tenements, or other hereditaments to be sold by his executors, after the death of any such testator, do refuse to take upon him or them the administration and charge of the same testament and last will wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the cure and charge of the same testament and last will; that then all bargains and sales of such lands, tenements, or other hereditaments, so willed to be sold by the executors of any such testator, as well heretofore made, as hereafter to be made by him or them only of the said executors that doth so accept, or that heretofore hath accepted and taken upon him or them any such cure or charge of administration of any such will or testament, shall be as good and as effectual in the law, as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, hath joined with him or them in the making of the bargain and sale of such lands, tenements, or other hereditaments so willed to be sold by the executors of any such testator, which heretofore hath made

4 *Office and Duty of Executors and Administrators.*

made or declared, or that hereafter shall make or declare any such will, of any such lands, tenements, or other hereditaments after his decease, to be sold by his executors.

II. Provided alway, That this act shall not extend to give power or authority to any executor or executors at any time hereafter to bargain or put to sale any lands, tenements, or hereditaments, by virtue and authority of any will or testament heretofore made, otherwise than they might do by the course of the common law afore the making this act.

A. D. 1535. 27 H. 8. c. 10.

An Act concerning Uses and Wills.

‘ WHERE by the common laws of this realm, lands, tenements and
‘ hereditaments be not devisable by testament, (2) nor ought to be trans-
‘ ferred from one to another, but by solemn livery and seisin, matter of
‘ record, writing sufficient made *bona fide*, without covin or fraud; (3)
‘ yet nevertheless divers and sundry imaginations, subtle inventions and
‘ practices have been used, whereby the hereditaments of this realm
‘ have been conveyed from one to another by fraudulent feoffments,
‘ fines, recoveries, and other assurances craftily made to secret uses,
‘ intents and trusts; (4) and also by wills and testaments, sometime
‘ made by *nude parol* and words, sometime by signs and tokens, and
‘ sometime by writing, and for the most part made by such persons as
‘ be visited with sickness, in their extreme agonies and pains, or at
‘ such time as they have scantly had any good memory or remembrance;
‘ (5) at which times they being provoked by greedy and covetous per-
‘ sons lying in wait about them, do, many times, dispose indiscreetly
‘ and unadvisably their lands and inheritances; (6) by reason whereof,
‘ and by occasion of which fraudulent feoffments, fines, recoveries and
‘ other like assurances to uses, confidences and trusts, divers and many
‘ heirs have been unjustly, at sundry times, disinherited, the lords have
‘ lost their wards, marriages, reliefs, heriots, escheats, aids *pur fair*
‘ *fits chivalier*, & *pur file marier*; (7) and scantly any person can be
‘ certainly assured of any lands by them purchased, nor know surely
‘ against whom they shall use their actions or executions for their rights,
‘ titles and duties; (8) also men married have lost their tenancies by
‘ the curtesy, (9) women their dowers, (10) manifest perjuries by
‘ trial of such secret wills and uses have been committed; (11) the
‘ king’s highness hath lost the profits and advantages of the lands of
‘ persons attainted, (12) and of the lands craftily put in feoffments to
‘ the uses of aliens born, (13) and also the profits of waste for a year
‘ and a day of lands of felons attainted, (14) and the lords their escheats
‘ thereof; (15) and many other inconveniencies have happened, and
‘ daily do increase among the king’s subjects, to their great trouble
‘ and inquietness, and to the utter subversion of the ancient common
‘ laws of this realm, (16) for the extirping and extinguishment of all
‘ such subtle practised feoffments, fines, recoveries, abuses and errors
‘ heretofore used and accustomed in this realm, to the subversion of
‘ the good and ancient laws of the same, and to the intent that the king’s
‘ highness, or any other his subjects of this realm, shall not in any
‘ wise

* wise hereafter, by any means or inventions, be deceived, damaged or hurt, by reason of such trusts, uses or confidences:' (17) Be it enacted, That where any person or persons stand or be seized, or at any time hereafter shall happen to be seized, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner of means whatsoever it be; that in every such case, all and every such person and persons, and bodies politic, that have or hereafter shall have any such use, confidence or trust, in fee-simple, fee-tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged in lawful seisin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates, as they had or shall have in use, trust or confidence of or in the same; (19) and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be seized of any lands, tenements, or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence, or trust that was in them.

II. And where divers and many persons be, or hereafter shall happen to be, jointly seized of and in any lands, tenements, rents, reversions, remainders, or other hereditaments, to the use, confidence or trust of any of them that be so jointly seized, that in every such case, that those person or persons which have, or hereafter shall have, any such use, confidence or trust in any such lands, tenements, rents, reversions, remainders, or hereditaments, shall, from henceforth have, and be deemed and adjudged to have only to him or them that have, or hereafter shall have any such use, confidence or trust, such estate, possession and seisin, of, and in the same lands, tenements, rents, reversions, remainders, and other hereditaments, in like nature, manner, form, condition, and course, as he or they had before in the use, confidence or trust of the same lands, tenements, or hereditaments; (2) saving and reserving to all and singular persons, and bodies politic, their heirs and successors, other than those person or persons which be seized, or hereafter shall be seized of any lands, tenements, or hereditaments, to any use, confidence, or trust, all such right, title, entry, interest, possession, rents and action, as they, or any of them had, or might have had before the making of this act.

III. And also, saving to all and singular those persons, and to their heirs, which be, or hereafter shall be seized to any use, all such former right, title, entry, interest, possession, rents, customs, services and action, as they, or any of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents, or hereditaments, whereof

whereof they be, or hereafter shall be seized to any other use, as if this present act had never been had nor made; any thing contained in this act to the contrary notwithstanding.

‘IV. And where also divers persons stand and be seized of and in any lands, tenements or hereditaments, in fee-simple or otherwise, to the use and intent, that some other person or persons shall have and receive yearly to them, and to his or their heirs, one annual rent of x. li. or more or less, out of the same lands and tenements, and some other person, one other annual rent, to him and his assigns, for term of life or years, or for some other special time, according to such intent and use, as hath been heretofore declared, limited and made thereof.’

V. Be it therefore enacted, that in every such case, the same persons, their heirs and assigns, that have such use and interest, to have and receive any such annual rents out of any lands, tenements, or hereditaments, that they, and every of them, their heirs and assigns, be adjudged and deemed to be in the possession and seisin of the same rent, of, and in such like estate as they had in the title, interest, or use of the said rent or profit, and as if a sufficient grant, or other lawful conveyance, had been made and executed to them, by such as were or shall be seized to the use or intent of any such rent to be had, made, or paid, according to the very trust and intent thereof; (2) and that all and every such person and persons as have, or hereafter shall have, any title, use, and interest in, or to any such rent or profit, shall lawfully distrain for non-payment of the said rent, and in their own names make avowries, or by their bailiffs or servants, make conusances and justifications, (3) and have all other suits, entries, and remedies for such rents, as if the same rents had been actually and really granted to them, with sufficient clauses of distress, re-entry, or otherwise, according to such conditions, pains, or other things limited and appointed, upon the trust and intent for payment or surety of such rent.

VI. And that whereas divers persons have purchased, or have estate made and conveyed of and in divers lands, tenements, and hereditaments, unto them, and to their wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife, for term of their lives, or for term of life of the said wife; (2) or where any such estate or purchase of any lands, tenements, or hereditaments, hath been, or hereafter shall be made to any husband and to his wife, in manner and form expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointure of the wife; (3) that then in every such case, every woman married, having such jointure made, or hereafter to be made, shall not claim, nor have title to have any dower of the residue of the lands, tenements, or hereditaments, that at any time were her said husband's, by whom she hath any such jointure, nor shall demand nor claim her dower of and against them that have the lands and inheritances of her said husband; (4) but if she have no such jointure, then she shall be admitted and enabled to pursue, have, and demand her dower

dower by writ of dower, after the due course and order of the common laws of this realm; this act, or any law or provision made to the contrary thereof notwithstanding.

VII. Provided alway, That if any such woman be lawfully expelled or evicted from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expelled shall amount or extend unto.

VIII. Provided also, That this act, nor any thing therein contained or expressed, extend, or be in any wise hurtful or prejudicial to any woman or women heretofore being married, of, for, or concerning such right, title, use, interest or possession, as they or any of them have, claim, or pretend to have, for her or their jointure or dower, of, in, or to any manors, lands, tenements, or other hereditaments, of any of their late husband's, being now dead or deceased; any thing contained in this act to the contrary notwithstanding.

IX. Provided also, That if any wife have, or hereafter shall have, any manors, lands, tenements or hereditaments unto her given and assured after marriage, for term of her life, or otherwise in jointure, except the same assurance be to her made by act of parliament, and the said wife, after that fortune, to overlive her said husband, in whose time the said jointure was made, or assured unto her, that then the same wife, so overliving, shall, and may, at her liberty, after the death of her said husband, refuse to have and take the lands and tenements so to her given, appointed or assured during the coverture, for term of her life, or otherwise in jointure, except the same assurance be to her made by act of parliament, as is aforesaid, (2) and thereupon to have, ask, demand and take her dower by writ of dower or otherwise, according to the common law, of, and in all such lands, tenements and hereditaments as her husband was and stood seized of any state of inheritance at any time during the coverture; any thing contained in this act to the contrary thereof notwithstanding.

X. Provided also, That this present act, or any thing herein contained, extend, nor be at any time hereafter interpreted, expounded or taken, to extinct, release, discharge, or suspend any statute, recognizances, or other bond, by the execution of any estate, of, or in any lands, tenements or hereditaments, by the authority of this act, to any person or persons, or bodies politic; any thing contained in this act to the contrary thereof notwithstanding.

XI. And forasmuch as great ambiguities and doubts may arise of the validity and invalidity of wills heretofore made of any lands, tenements and hereditaments, to the great trouble of the king's subjects; be it enacted, that all manner of true and just wills and testaments heretofore made by any person or persons deceased, or that shall decease before the 1st day of *May*, that shall be in the year of our Lord God 1536, of any lands, tenements, or other hereditaments, shall be taken and accepted good and effectual in the law, after such fashion, manner, and form, as they were commonly taken and used at any time within 40 years

years next afore the making of this act; any thing contained in this act, or in the preamble thereof, or any opinion of the common law to the contrary thereof notwithstanding.

XIV. All and singular person and persons, and bodies politic, which at any time on this side the said first day of *May*, which shall be in the year of our Lord God 1536, shall have any estate unto them executed of and in any lands, tenements, or hereditaments, by the authority of this act, shall and may have and take the same or like advantage, benefit, voucher, aid, prayer, remedy, commodity, and profit, by action, entry, condition, or otherwise, to all intents, constructions, and purposes, as the person or persons seized to their use, of, or in any such lands, tenements, or hereditaments, so executed, had, should, might or ought to have had at the time of the execution of the estate thereof, by the authority of this act, against any other person or persons, of, or for any waste, disseisin, trespass, condition broken, or any other offence, cause or thing concerning or touching the said lands or tenements so executed by the authority of this act.

A. D. 1542-3. 34 & 35 H. 8. c. 5.

* *The Bill concerning the Explanation of Wills.*

III. WHEREAS it is contained in the same former statute, within divers articles and branches of the same, that all and singular person and persons having any manors, lands, tenements, or hereditaments, of the estate of inheritance, should have full and free liberty, power and authority to give, will, dispose, or assign, as well by his last will and testament, in writing, or otherwise by any act or acts, lawfully executed in his life, his manors, lands, tenements or hereditaments, or any of them, in such manner and form as in the same former act more at large it doth appear. Which words of estate of inheritance, by the authority of this present parliament, is and shall be declared, expounded, taken and judged of estate in fee-simple only.

XIV. † And it is further enacted, that wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, or *person within the age of twenty-one years*, idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in the law.

A. D. 1601. 43 Eliz. c. 8.

An Act against fraudulent Administration of Intestates Goods.

‘FORASMUCH as it is often put in ure, to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying intestate, committed unto them, if they require it, will
‘ not

* The construction of the words contained in the 3d § having been received and adopted in our jurisprudence, it is inserted here to shew that it derives its authority from the legislature.

† This clause is introduced into the A. A. 597; wherein, although words are introduced of much more extensive import than these above, they have omitted the words in italics here: But the whole clause is declaratory of the common law, which is made of force here by 5th § of A. A. No. 331.

not accept the same, but suffer or procure the administration to be granted to some stranger of mean estate, and not of kin to the intestate, from whom themselves or others, by their means, do take deeds of gifts and authorities by letter of attorney, whereby they obtain the estate of the intestate into their hands, and yet stand not subject to pay any debts owing by the same intestate, and so the creditors, for lack of knowledge of the place of habitation of the administrator, cannot arrest him nor sue him; and if they fortune to find him out, yet, for lack of ability in him to satisfy, of his own goods, the value of that he hath conveyed away of the intestate's goods, or released of his debts by way of wasting, the creditors cannot have or recover their just and due debts.'

II. Be it enacted, that every person and persons that hereafter shall obtain, receive, and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate, upon any fraud, as is aforesaid, or without such valuable consideration as shall amount to the value of the same goods or debts, or near thereabouts, (except it be in or towards satisfaction of some just and principal debt of the value of the same goods or debts to him owing by the intestate at the time of his decease) shall be charged and chargeable as executor of his own wrong: (2) and so far only as all such goods and debts, coming to his hands, or whereof he is released or discharged by such administrator, will satisfy, deducting nevertheless, to and for himself, allowance of all just, due and principal debts upon good consideration, without fraud, owing to him by the intestate, at the time of his decease; and of all other payments made by him, which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm.

A. D. 1665. 17 C. 2. c. 8.

An Act for avoiding unnecessary Suits and Delays.

FOR the avoiding of unnecessary suits and delays, be it enacted, that in all actions, personal, real, or mixt, the death of either party, between the verdict and the judgment, shall not hereafter be alledged for error, so as such judgment be entered within two terms after such verdict.

II. And be it further enacted, where any judgment, after a verdict shall be had, by, or in the name of any executor or administrator; in such case, an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment.

A. D. 1670. 22 and 23 C. 2. c. 10.

An Act for the better settling of Intestates Estates.

BE it enacted, that all ordinaries, as well the judges of the prerogative courts of *Canterbury* and *York*, for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may, upon their respective granting and committing of administrations of the goods of persons dying intestate, after the first day of *June*, 1671, of the respective person or persons to whom any administration is to be committed, take sufficient bonds, with two or more able sureties,

ties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis, viz.*

• II. The condition of this obligation is such, that if the within bounded *A. B.* administrator of all and singular the goods, chattels, and credits of *C. D.* deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which have or shall come to the hands, possession, or knowledge of him the said *A. B.* or into the hands and possession of any other person or persons for him, and the same so made, do exhibit or cause to be exhibited, into the registry of court, at or before the day of next ensuing; (2) and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased, at the time of his death, which at any time after shall come to the hands or possession of the said *A. B.* or into the hands and possession of any other person or persons for him, do well and truly administer according to law; (3) and further do make, or cause to be made, a true and just account of his said administration, at or before the day of and all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges, for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges, by his or their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint. (4) And if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named, do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said *A. B.* within bounden, being thereunto required, do render and deliver the said letters of administration, (approbation of such testament being first had and made) in the said court, then this obligation to be void and of none effect, or else to remain in full force and virtue.

III. Which bonds are hereby declared and enacted to be good, to all intents and purposes, and pleadable in any courts of justice: (2) And also, that the said ordinaries and judges respectively, shall, and may, and are enabled to proceed and call such administrators to account, for and touching the goods of any person dying intestate: (3) and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear, (after all debts, funerals, and just expences of every sort, first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person, in equal degree, or legally representing their stocks, *pro suo quique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of his Majesty's ecclesiastical laws: (4) Saving to every one, supposing him or themselves aggrieved, their right of appeal, as was always in such cases used.

V. Provided

V. Provided always, that all ordinaries, and every other person, who by this act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following; that is to say, (2) One third part of the said surplusage to the wife of the intestate, and all the residue, by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his life-time, by portion or portions equal to the share which shall, by such distribution, be allotted to the other children to whom such distribution is to be made: (3) And in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his life-time, by portion, not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the life-time of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: (4) But the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise from the intestate.

VI. And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next kindred of the intestate, who are in equal degree, and those who legally represent them.

VII. Provided, that there be no representations admitted among collaterals after brothers and sisters children: (2) and in case there be no wife, then all the said estate to be distributed equally to and amongst the children: (3) and in case there be no child, then to the next of kindred in equal degree of, or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever.

VIII. Provided also, and be it likewise enacted, to the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate, to be made till after one year be fully expired after the intestate's death: (2) and that such and every one to whom any distribution and share shall be allotted, shall give bond, with sufficient sureties, in the said courts, that if any debt or debts truly owing by the intestate, shall be afterwards sued for and recovered, or otherwise duly made to appear; that then, and in every such case, he or she shall respectively refund and pay back to the administrator, his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator, by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid.

IX. Provided

IX. Provided always, in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do, and the will of the deceased, in such testament expressed, shall be performed and observed in such manner as it should have been if this act had never been made.

A. D. 1672. 29 C. 2. c. 3.

An Act for Prevention of Frauds and Perjuries.

‘FOR prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of ‘perjury;’ (2) be it enacted, that from and after the 24th day of June, which shall be in the year of our Lord 1677, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the *parties so making or creating* the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding.

II. Except, nevertheless, all leases, not exceeding the term of three years, from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts, at the least of the full improved value of the thing demised.

III. And moreover, that no leases, estates or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall, at any time after the said 24th day of June, be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the *party so assigning, granting, or surrendering* the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law.

IV. And be it further enacted, that from and after the said 24th day of June, no action shall be brought, whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise, to answer for the debt, default, or miscarriages of another person; (3) or to charge any person upon any *agreement made upon consideration* of marriage; (4) or upon any *contract or sale* of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the *agreement* upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the *party to be charged therewith*, or some other person thereunto *by him* lawfully authorised.

V. And be it further enacted, that from and after the said 24th day of June, all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the

the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect.

VI. And moreover, no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall, at any time after the said 24th day of June, be revocable, otherwise than by some other will or codicil in writing; or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator or his directions, in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

VII. And be it further enacted, that from and after the said 24th day of June, all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party, who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of none effect.

VIII. Provided always, that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise, or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; any thing herein before contained to the contrary notwithstanding.

IX. And be it further enacted, that all grants and assignments of any trust or confidence, shall likewise be in writing, signed by the party *granting or assigning the same*, or by such last will or devise, or else shall likewise be utterly void and of none effect.

X. And be it further enacted, that from and after the said 24th day of June, it shall and may be lawful for every sheriff, or other officer, to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognition hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons be, in any manner of wise, seized or possessed, or hereafter shall be seized or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seized of such lands, tenements, rectories, tithes, rents, or other hereditaments of such estate as they be seized of in trust for him at the time of the said execution sued: (2) which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution,

cution, shall accordingly be held and enjoyed free and discharged from all incumbrances of such person or persons as shall be so seized or possessed in trust for the person against whom such execution shall be sued; (3) and if any *Cestuy que Trust* hereafter shall die, leaving a trust, in fee-simple, to descend to his heir, there, and in every such case, such trust shall be deemed and taken, and is hereby declared to be, assets by descent, and the heir shall be liable to, and chargeable with the obligation of his ancestors, for, and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended; any law, custom, or usage to the contrary in any wise notwithstanding.

XI. Provided always, that no heir that shall become chargeable by reason of any estate or trust, made assets in his hands by this law, shall, by reason of any kind of plea or confession of the action, or suffering judgment by *Nient dedire*, or any other matter, be chargeable to pay the condemnation out of his own estate; (2) but execution shall be sued of the whole estate so made assets in his hands by descent, in whose hands soever it shall come after the writ purchased, in the same manner as it is to be at and by the common law, where the heir at law pleading a true plea, judgment is prayed against him thereupon; any thing in this present act contained to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following; (2) Be it further enacted, that from henceforth any estate *pour autre vie*, shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor, by three or more witnesses; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of their heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple; (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

XIII. And whereas it hath been found mischievous, that judgments in the king's courts at *Westminster*, do many times relate to the first day of the term whereof they are entered, or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged or suffered and signed in the vacation-time after the said term, whereby many times purchasers find themselves aggrieved:

XIV. Be it enacted, that from and after the said 24th day of June, any judge or officer of any of his Majesty's courts of *Westminster*, that shall sign any judgments, shall, at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paper-book, docket, or record, which he shall sign; which day of the month and year shall also be entered upon the margin of the roll record where the said judgment shall be entered.

XV. And be it enacted, that such judgments as, against purchasers *bona fide* for valuable consideration of lands, tenements, or hereditaments, to be charged thereby, shall, in consideration of law, be judgments only from

from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original or filing the bail; any law, usage, or course of any court to the contrary notwithstanding.

XVI. And be it further enacted, that from after the said 24th day of June, no writ of *fieri facias*, or other writ of execution, shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff or coroners, to be executed: And for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall, upon the receipt of any such writ, (without fee for doing the same) endorse upon the back thereof the day of the month or year whereon he or they received the same.

XVII. And be it further enacted, that from and after the said 24th day of June, no contract for the sale of any goods, wares, and merchandises, for the price of £. 10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or *memorandum* in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised.

XVIII. And be it further enacted, that the day of the month and year of the enrollment of the recognizance shall be set down in the margin of the roll where the said recognizances are enrolled; (2) and that from and after the said 24th day of June, no recognizance shall bind any lands, tenements, or hereditaments, in the hands of any purchaser *bona fide*, and for valuable consideration, but from the time of such enrollment; any law, usage, or course of any court to the contrary in any wise notwithstanding.

‘XIX. And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury;’ (2) Be it enacted, that from and after the aforesaid 24th day of June, no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of £. 30, that is not proved by the oaths of three witnesses, (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

XX. And be it further enacted, that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will noncupative, except the said testimony, the substance thereof were committed to writing, within six days after the making of the said will.

XXI. And no letters testamentary, or probate of any noncupative wills,

will, shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

XXII. And no will in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will, by word of mouth only, except the same be, in the life of the testator, committed to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

XXIII. Provided always, that notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of this act.

XXIV. And for the explaining one act of this present parliament, entitled, *An act for the better settling of intestates estates*; (2) be it declared, that neither the said act, nor any thing therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act.

A. D. 1677. 30 C. 2. c. 7.

An Act to enable Creditors to recover their Debts of the Executors and Administrators of Executors in their own wrong.

‘WHEREAS the executors and administrators of such persons who have possessed themselves of considerable personal estates, of other dead persons, and converted the same to their own use, have no remedy by the rules of the common law, as it now stands, to pay the debts of those persons whose estate hath been so converted by their testator or intestate, which hath been found very mischievous, and many creditors defeated of their just debts, although the debtors left behind them sufficient to satisfy the same, with a great overplus:’

II. For remedy whereof, be it enacted, that all and every the executors and administrators of any person or persons, who, as executor or executors in his or their own wrong, or administrators, shall, from and after the first day of *August* next ensuing, waste or convert any goods, chattels, estate or assets of any person deceased, to their own use, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living. Enlarged by 4 and 5 W. and M. c. 24. §. 12.

A. D. 1685. 1 J. 2. c. 17.

An Act for Reviving and Continuance of several Acts of Parliament therein mentioned.

V. BE it enacted, that one other act, made in the 17th year of his said late Majesty’s reign, entitled, *An act for avoiding unnecessary suits and delays*: and also one other act, made in the 22d and 23d year of his late Majesty’s

Majesty's reign, entitled, *An act for the better settling intestates estates*, (which said latter act is explained by a clause in one other act, made in the 29th year of his said late Majesty's reign, entitled, *An act for prevention of frauds and perjuries*) both which said acts, with the said clause, are continued by one other act, made in the 13th year of his said late Majesty's reign, entitled, *An act for reviving both the said former acts*. All which said acts and clauses shall be in force, and is hereby made perpetual.

VI. It is hereby enacted, that no administrator shall, from the 24th day of *July* next, be cited to any the courts in the said last act mentioned, to render an account of the personal estate of his intestate, (otherwise than by an inventory or inventories thereof,) unless it be at the instance or prosecution of some person or persons in behalf of a minor, or having a demand out of such personal estate as a creditor or next of kin; nor be compellable to account before any the ordinaries or judges by the said last act empowered and appointed to take the same, otherwise than as is aforesaid; any thing in the said last acts contained to the contrary notwithstanding.

VII. Provided also, that if, after the death of a father, any of his children shall die intestate, without wife or children, in the life-time of the mother, every brother and sister, and the representatives of them, shall have an equal share with her; any thing in the last mentioned acts to the contrary notwithstanding.

A. D. 1691. 3 and 4 W. and M. c. 14.

An Act for the Relief of Creditors against fraudulent Devises.

‘WHEREAS it is not reasonable or just, that, by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts; and, nevertheless, it hath often so happened, that where several persons having, by bonds or other specialties, bound themselves and their heirs, and have afterwards died seised, in fee-simple, of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same, or disposed thereof in such manner as such creditors have lost their said debts:’ For remedying of which, and for the maintenance of just and upright dealing,

II. Be it enacted, that all wills and testaments, limitations, dispositions, or appointments, of, or concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same, by his, her, or their last wills or testaments, to be made after the 25th day of *March*, in the year of our Lord God 1692, shall be deemed and taken (only as against such creditor or creditors as aforesaid, his, her, and their heirs, successors, executors, administrators and assigns, and every of them) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed
D consideration,

consideration, or any other matter or thing to the contrary notwithstanding.

III. And for the means that such creditors may be enabled to recover their said debts, be it further enacted, that, in the cases before mentioned, every such creditor shall, and may have and maintain his, her, and their action, and actions of debt, upon his, her, and their said bonds and specialties, against the heir and heirs at law, of such obligor or obligors, and such devisee and devisees, jointly, by virtue of this act; and such devisee or devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended.

IV. Provided, that where there hath been or shall be any limitation or appointment, devise or disposition, of, or concerning any manors, messuages, lands, tenements or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, other than the heir at law, according to, or in pursuance of any marriage contract, or agreement in writing *bona fide* made before such marriage, the same, and every of them shall be in full force; and the same manors, messuages, lands, tenements and hereditaments, shall and may be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid, and satisfied; any thing in this act contained to the contrary notwithstanding.

V. And whereas several persons, being heirs at law, to avoid the payment of such just debts, as, in regard of the lands, tenements and hereditaments descending to them, they have by law been liable to pay, have sold, aliened, or made over such lands, tenements, or hereditaments, before any process was or could be issued out against them; Be it further enacted, that, in all cases where any heir at law shall be liable to pay the debt of his ancestor in regard of any lands, tenements or hereditaments descending to him, and shall sell, alien, or make over the same, before any action brought, or process sued out against him, that such heir at law shall be answerable for such debt or debts, in an action or actions of debt, to the value of the said land so by him sold, aliened, or made over; in which cases all creditors shall be preferred, as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments *bona fide* aliened before the action brought, shall not be liable to such execution.

VI. Provided, that, where any action of debt upon any specialty is brought against any heir, he may plead *riens per descent*, at the time of the original writ brought, or the bill filed against him; any thing herein

herein contained to the contrary notwithstanding; and the plaintiff in such action may reply, that he had lands, tenements, or hereditaments from his ancestor before the original writ brought, or bill filed; and if upon issue joined thereupon, it be found for the plaintiff, the jury shall enquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given, and execution shall be awarded as aforesaid: but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to enquire of the lands, tenements, or hereditaments so descended.

VII. Provided also, and be it further enacted, that all and every devisee, and devisees, made liable by this act, shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements, and hereditaments, to him or them devised, shall be aliened before the action brought.

A. D. 1692. 4 and 5 W. and M. c. 24.

An Act for reviving, continuing, and explaining several Laws therein mentioned, which are expired and near expiring.

XII. And be it further enacted by the authority aforesaid, that an act made in the thirtieth year of the reign of King Charles the second, entitled, An act to enable creditors to recover their debts of the executors and administrators of executors in their own wrong; which said act, in the first year of the reign of the late King James the second, was enacted to be in force from the first day of the then present session of Parliament, and to continue for seven years, and from thence to the end of the first session of the then next Parliament, shall be, and is hereby continued and made perpetual. And forasmuch as it hath been a doubt whether the said act did extend to any executor or executors, administrator or administrators of any executor or administrator of right, who, for want of privity in law, were not before answerable, nor could be sued for the debts due from or by the first testator or intestate, notwithstanding that such executors or administrators had wasted the goods and estate of the first testator or intestate, or converted the same to his or their own use: For remedy whereof, be it enacted, that all and every the executor and executors, administrator or administrators of such executor or administrator of right, who shall waste or convert to his own use, goods, chattels, or estate of his testator or intestate, shall, from henceforth be liable and chargeable in the same manner as his or their testator or intestate should or might have been; any law or usage to the contrary notwithstanding.

A. D. 1731. No. 553.

An Act for Remission of Arrears of Quit-Rents, &c.

VII. *The first part of this clause obsolete.*—IF any person or persons who are possessed of any lands or tenements in this province, have, by fire or other accident, lost their original grant or deed, or will under which

which they immediately claim, and do and shall make oath of the same before the said auditor or his deputy, who is hereby empowered to administer such oath, that then and in such case, if a record of such grant, deed or will can be found in the secretary's or public register's office of this province, the party claiming under any such lost grant, deed, or will, shall produce an attested copy of such grant, deed or will, or probate of the same, from the said secretary or register, unto his Majesty's auditor or his deputy, who shall register the same in manner as before directed for original grants, deeds, or wills, and shall indorse a special certificate of the same on the attested copy of such grant, deed, or will, or probate of the same; and the record of such grant, deed, or will in the secretary's and public register's office, together with the actual possession of the party claiming under the same, shall be deemed good evidence of a title at law, until better evidence of a title appears: *Provided* also nevertheless, that where any person or persons, by fire or other accident, have lost their original grant, or title deed under which they claim, or where such grants or deeds are much torn, obliterated, or defaced by casualties, and no record can be found thereof in the secretary's or register's office, nor of the will under which he claims, and the party making oath, that he claimeth under a grant, deed, or will, which hath been *bona fide* lost, or where the same appears to be casually obliterated, torn or defaced, and shall prove by other evidence, that he or those under whom he claims, have been in the actual and peaceable possession of the lands he now claimeth, for the full space and term of 7 years and upwards, that it shall and may be lawful for such person to purchase a new grant from his Majesty for the same, paying the same quit-rents at 12d. per 100 acres, proclamation money, so that such new grant shall not be construed to extend to bar him that better title had before the taking out such new grant, nor to strengthen his title against any other person that layeth claim to the same lands; but that such other person, then living and residing within this province, may, at any time within 7 years next after the issuing thereof, pursue his title at law, notwithstanding any such new grant; and such new grant shall not be given in evidence to bar him that better right had at or immediately before the obtaining such new grant; saving the right also of infants, feme-coverts, and persons beyond the seas, or off this province, as is aforesaid.

A. D. 1734. No. 597.

An Act for making more effectual Wills and Testaments, &c.

WHEREAS there are many estates in this province held under wills and testaments; and to the intent that the titles may not be questioned where such wills and testaments have been duly executed, and for the prevention of any vexatious or contentious suits which may be brought or commenced hereafter, *be it enacted*, that all former wills and testaments heretofore made, for, of, or concerning any lands, tenements, or hereditaments, shall and are hereby declared, to all intents and purposes whatsoever, to be good, valid, and effectual in law, according to the true tenor and purport of the same, as fully and effectually

ally as if the statute of the 32d of Henry the 8th, chap. 1st, and the statute of the 34th of Henry the 8th, chap. 5th, of Great-Britain, was or were of force in this province at the time of the making of the said wills and testaments; any law, custom or usage to the contrary notwithstanding:—Provided, that nothing herein before contained shall extend, or be construed to make the statute of Westminster the 2d, chap. the 1st, 13th of Edward the 1st, entitled, in gifts in tail, the donor's will shall be observed the form of a formedon, commonly called the statutes of entails, or any part thereof, of force in this province, or to make estates, which were or are fee-simple, conditional at the common law, estates in tail in this province: Provided also, that nothing in this act shall be construed to confirm or make good any wills heretofore made in this province, since a statute made in Great-Britain the 29th of Car. 2d, entitled, 'An act for preventing of frauds and perjuries,' has been made of force here, if such wills are not agreeable to the said statute.

II. And from and after the ratification of this act, all and singular every person and persons having any estate or interest in fee-simple, or any such estate in coparcenary, joint-tenancy, or tenancy in common, of, and in any lands, tenements, rents, services, or other hereditaments, in possession, reversion, or remainder, shall and may have full power, free liberty and authority to give, dispose, will, or devise to any person or persons (except bodies politic or corporate) by his last will and testament in writing, and duly executed according to an act made in the 29th year of Car. 2d, for preventing of frauds and perjuries, as much as in him of right belongs; is or shall be, all his said lands, tenements, rents, services, or other hereditaments, remainders or reversions, or any of them, at his and their own free will and pleasure; any law, statute, or usage to the contrary notwithstanding.

III. And for the effectual proving nuncupative or verbal wills, *it is hereby enacted*, that all witnesses which are good witnesses at trials at common law, shall be good witnesses to prove a nuncupative or verbal will, made of goods and chattels agreeably to the afore-mentioned statute for preventing of frauds and perjuries.

IV. And from and after the ratification of this act, any widow may bequeath, by will, the crop or crops standing or growing on the grounds of her dower; or on other lands planted for her use: and that a parson may by will bequeath the crop or crops growing or standing on his glebe land; any thing to the contrary notwithstanding.

V. *Provided* now and all times, that any will or testament made or to be made by any feme-covert, idiot, or any person of *non sane* memory shall not be good or valid in law; any thing herein before to the contrary notwithstanding.

A. D. 1740. No. 704.

An Act concerning Masters and Apprentices.

V. THE time of service of any apprentices (who now are or shall be indented to serve their masters, mistresses, their executors or assigns, in this province) remaining unexpired at the time of the death of any of the

the masters or mistresses of such apprentice, and not before assigned in manner aforesaid, shall from henceforth be deemed and taken as assets in the hands of the executors or administrators of any such masters or mistresses. And it shall and may be lawful to and for such executors or administrators, to retain any such apprentice in their own service during the remainder of such time; provided the executor or administrator so retaining such apprentice, doth, at the time of such retainure, carry on and exercise, by himself, or some other white person in his employ, within the same parish where the testator lived, the same employment, calling, art, mystery, or trade to which the said apprentice was bound by his indentures, or otherwise, if the executors or administrators of such deceased person think fit, it shall be lawful for them to assign and transfer such indenture, and the time therein unexpired, (with the consent of any two justices of the peace of the county where the assignee resides) to any other person carrying on and exercising, within this province, the same employment, calling, art, mystery, or trade specified in the said indenture; which said indenture, so retained or assigned, shall be valid and effectual to the executor or administrator so retaining, and to such assignee, as to the time remaining unexpired, as if the said apprentice had been originally indented to such executor, administrator, or assignee; and the said executor, administrator, and assignee, on retaining such apprentice, or accepting such assignment, shall be equally bound to the said apprentice, according to the tenor of the indenture, as the original master or mistress was.

A. D. 1745. No. 748.

An Act to direct Executors and Administrators, &c.

WHEREAS several excutors and administrators, and other persons within this province, who have been intrusted with the execution of wills, and the management of the fortunes and estates of infants and minors, through mistaken notions of their duty, have not made and returned into the secretary's office of this province, full and perfect inventories and appraisements of all the chattels and effects which have come into their hands to be administered, whereby such infants and minors, and all other persons concerned, have been greatly injured and defrauded. And whereas high and exorbitant charges have been usually made by such executors, administrators and trustees, for their trouble in the management and administration of such their testator and intestates estates; by which means such estates have been greatly lessened and diminished, to the manifest hurt and prejudice of the kindred, legatees and creditors of such testator or intestate: For remedy whereof, and to prevent the like evils and abuses for the future, *be it enacted*, that from and after the passing of this act, all and every executor and administrator, who shall, before the ordinary of this province for the time being, or such person as he shall depute or appoint, qualify him or herself for the administration of the estate and effects of his or her testator or intestate, shall, upon oath, be bound to produce and shew to the appraisers that shall be appointed by the ordinary for that purpose, or any three or more of them, all and singular the goods and chattels of the said testator

tator or intestate, as have or shall come into their or either of their hands, possession or knowledge, and within sixty days after such, his, or her qualification, shall cause to be made a true and just appraisement, upon oath, of all and singular the goods and chattels aforesaid, and exhibit, or cause to be exhibited the said appraisement, certified under the hands of any three or more of the appraisers aforesaid, into the secretary's office in Charlestown, within ninety days after such his or her qualification, together with a full and perfect inventory of all and singular the rights and credits of the said testator or intestate, whether the same be in ready money, judgments, bonds, or other specialties, or notes of hand, together with a list or schedule of the books of account of such testator or intestate person, and the number of pages in such books; to which books all parties concerned shall, at all convenient times, have free access; and every such executor and administrator shall be, and they are hereby made chargeable with the real value of the goods and chattels in the said inventory contained, and with so much of the said credits only as he, she or they, after due and proper diligence, shall recover and receive, in like manner as executors and administrators are made chargeable by the common or statute law of England.

II. *Altered by A. A. 13th March, 1789.*

III. And whereas a custom hath too much prevailed among executors and administrators, of taking estates, or some parts thereof, at the appraisement, when such appraisement hath been under the true value: For prevention whereof for the future, *be it enacted*, that no executor or administrator shall hereafter be permitted to take any estate, or any part thereof, at the appraisement; and that no appraisement, to be made as aforesaid, shall be binding or conclusive, either upon the creditors, legatees next a-kin, or other person interested in such estates, or upon the executors or administrators; but all and every such executors and administrators shall be accountable and chargeable for the true value of such estates; any practice to the contrary notwithstanding.

IV. *Altered by A. A. 13th March, 1789.*

V. *Re-enacted in A. A. 13th March, 1789.*

VI. All guardians and trustees, who shall have the care, management or custody of the estates, real or personal, of any infants or minors in this province, shall be obliged, once at least in every 3 years, and so from time to time, to render, upon oath, true and perfect inventories and accounts of all monies, goods, chattels and effects, which they shall, from time to time, receive, during the minority of such infant or infants, into the secretary's office of this province.

VII. *And be it further enacted by the authority aforesaid*, that no appraisers, that shall hereafter be appointed to appraise any testator or intestate's goods and chattels, shall enter upon that office before they shall have taken the following oath, before a justice of the peace, who is hereby empowered to administer the same.

You A. B. C. D. E. F. &c. do swear, that you will make a just and true appraisement of all and singular the goods and chattels, (ready money only excepted) of G. H. deceased, as shall be produced by I. K. the executor or administrator of the estate of the said G. H. deceased, and that you will return the same, certified under your hands, unto the said I. K. executor or administrator, within the time prescribed by law.

VIII. And

VIII. And whereas it hath frequently happened in this province, that persons who have applied for and obtained letters of administration, on suggestion that they have been principal creditors to the intestate, and when they have received sufficient assets of the intestate to satisfy their own debts, have deserted the administration, or have neglected the recovery of the rest of the rights and credits of the intestate, which such administrators ought to have applied towards satisfaction of the rest of the creditors of the intestate. The more effectually to prevent the like for the future, *be it further enacted by the authority aforesaid*, that no letters of administration shall be hereafter granted by the ordinary of this province to any person or persons whosoever, as principal creditor or creditors to any intestate, but upon special trust and confidence, and for the benefit of all the rest of the creditors; and that all debts of an equal nature shall be discharged by such administrator in average and proportion, as far as the assets of the intestate shall extend; and that no preference shall be given among the creditors in equal degree; and that every such administrator shall be obliged to sue for such debts which he may reasonably expect to recover, or at the request and proper charges of any of the creditors of the intestate, assign and empower them, or any of them, to sue for the debts outstanding to the estate of such intestate; any law, usage or custom to the contrary notwithstanding.

IX. *Altered by A. A. 13th March, 1789.*

X. *And be it further enacted by the authority aforesaid*, that every executor or administrator, who shall not, within the time aforesaid, or within such further or reasonable time as the ordinary shall think fit to give, make and return into the secretary's office aforesaid, such inventory and appraisement as is herein before directed to be made and returned; and who shall make default in mentioning and inserting therein all or any of the credits or effects of his, her, or their testator or intestate as aforesaid, which came into their hands to be administered, every such executor or administrator shall be, and they and each of them are hereby made chargeable with and subject to the payment of all and singular their said testator or intestate's debts, legacies or bequests, in the same manner as executors of their own wrong are subjected and made chargeable by the common or statute law of England aforesaid.

XI. Every executor, administrator, guardian, or trustee, shall, for his care, trouble and attendance in the execution of their several duties and trusts, take, receive, or retain in his hands, a sum, not exceeding £ 2. 10s. for every £ 100. which he shall hereafter receive; and the sum of £ 2. 10s. for every £ 100. he shall pay away in credits, debts, legacies, or otherwise, during the course or continuance of their management or administration, and so in proportion for any sum less than £ 100. provided no executor, administrator, guardian, or trustee, shall, where they have power so to do, for his trouble, in letting out and lending any sum of money upon interest, and again receiving the monies so lent or let out, be entitled to receive, take, or retain any sum exceeding the sum of twenty shillings for every £ 10. for all sums arising by monies lent to interest, so to be by them received, and in like proportion for a larger and lesser sum; and provided no executor,
administrator,

administrator, guardian, or trustee, who is or may be creditors of any testator or intestate, or to whom may be let or bequeathed any sum of money, or other estate or effects, shall be entitled to any reward or commissions for the paying or retaining to themselves any such debts or legacies.*

XII. But as it may be very difficult to ascertain, the proper and adequate allowance to be made in all cases, and as the sums herein before allowed may not be a sufficient compensation for the care, trouble and pains which executors, administrators, guardians or trustees may take in the management of their respective trusts in some particular cases; *be it therefore enacted*, that if any executors, administrators, guardians or trustees, who shall have had extraordinary trouble in the management of the estates under their care, and shall not be satisfied with the sums herein before mentioned, such executors, administrators, guardians or trustees shall and may be at liberty to bring an action in the court of common pleas, for their services; and the verdict of the jury and judgment of the court thereupon, shall be final and conclusive in such cases. *Provided always*, that no verdict shall be given for more than 5 *per centum* over and above the sums allowed by this act.

XIII. *And be it further enacted*, that the commissions given by this act shall be divided amongst executors, administrators, guardians and trustees, according to the proportion of the services by them respectively performed, to be rated and settled by the chief justice and two of the justices of the court of common pleas, in case the executors, administrators, guardians and trustees cannot agree amongst themselves concerning the same.

A. D. 1748. No. 788.

An Act for empowering Persons to appoint Guardians to their Children, &c.

WHEREAS no provision hath hitherto been made in this province for empowering persons to appoint guardians to their children, *be it enacted*, † that where any person hath, or shall have any child, or children, under the age of 21 years, and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or his wife at that time shall be with child, or whether such father shall be under the age of 21 years, or of full age, by his deed, executed in his life-time, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of 21 years, ‡ to any person or persons in possession or remainder, other than to popish recusants. And that such
E disposition

* This § was omitted by mistake in the edition of the public laws.

† Copied from 12 C. 2. c. 24.

‡ In the statute of C. 2. the words, "or any lesser time," are inserted. Q. If it is not an omission here, as the same words are introduced in the second section of this act; but I have examined the original in the secretary's office, and this is a true copy therefrom: these words being also omitted there.

disposition of the custody of such child or children, made since the 25th day of March, 1730, or hereafter to be made, shall be good and effectual against all and every person and persons claiming the custody of such child or children, as guardians in socage or otherwise. And that such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass, against any person or persons who shall wrongfully take away or detain such child or children, for the recovery of such child or children, and shall and may recover damages for the same, in the said action, for the use and benefit of such child or children.

II. And all and every person and persons, to whom the custody of any child or children hath been or shall be so disposed or devised, shall and may take into his or their possession, to the use of such child or children, the profits of all lands, tenements, and hereditaments, of such child or children, and also the custody, **direction*, and management of the goods, chattels, and personal estate of such child or children, till their respective age of 21 years, or any lesser time, according to such disposition aforesaid, and may bring such action or actions, in relation thereunto, as by law a guardian in common socage might do.

III. And whereas no provision hath been hitherto made for the division of lands in this province, held in coparcenary, joint-tenancy, and tenancy in common; *be it further enacted*, that in all cases where any lands shall be given or descend to any persons in coparcenary, joint-tenancy, or tenancy in common, (and no provision made by will or otherwise, how such lands shall be divided) when, and as soon as any one of the said coparceners, joint-tenants, or tenants in common, shall be of the age of 21 years, he or she shall and may apply to the court of common pleas for a writ of partition; and in case he or she shall neglect so to do by the space of twelve months, then the guardian or guardians of him, her, or them, under age, shall be, and they are hereby required and directed to apply to the said court of common pleas for a writ of partition: and upon any such application the said court shall issue a writ of partition, directed to any five persons whom the said court shall think fit, requiring and commanding the said persons, they being first sworn, duly to execute the said writ of partition; and the said five persons shall immediately proceed to make an equal partition and division of all the said lands, either in entire tracts or in parcels, as they shall be of opinion will be most beneficial to the several coparceners, joint-tenants, or tenants in common, according to the best of their knowledge; and shall make return thereof, under their hands and seals, to the said court, within three months after, there to remain of record; which partition and division so to be made, shall be final and conclusive to all parties concerned; any law, usage or custom to the contrary notwithstanding.

* The above-mentioned statute of Charles 2. has the word TUITION, instead of the word DIRECTION here substituted.

A. D. 1778. No. 1199.

An Act for reviving and amending several Acts and Ordinances of the General Assembly of this State.

II. WHEREAS by an act passed the 25th day of May, 1745, entitled, *An act to direct executors and administrators in the manner of returning inventories and accounts of their testator's and intestate's estates, and to restrain the usual charges and commissions of such executors and administrators, and all other persons who shall be intrusted with the administration and management of minors' estates, it is enacted*, that no letters of administration shall be granted to any persons applying for the same, without such persons swearing that the deceased, on whose estate letters of administration are so applied for, made no will, as far as is consistent with the knowledge or belief of such persons so applying, by which great inconveniences and damage arise to many of the inhabitants of this state, who are next of kin to persons dying, whose last wills and testaments, by accident or otherwise, have become lost or destroyed, no person thereby having any legal authority to take charge or management of such estate: *be it therefore enacted*, that if any person applying for letters of administration, on the estate and effects of any person deceased, will not swear that such deceased made no will, consistent with the knowledge or belief of such person so applying for such administration, in manner as directed by law, to be sworn, but will make it appear upon oath, that such deceased had made a will which cannot be found by such person or persons so applying, and that such person or persons applying for such administration, verily believes or believe the said will to be lost or destroyed, together with the causes and reasons for such belief, it shall and may be lawful for the ordinary, or person empowered to grant administration, and to whom such application is made, to grant such letters of administration to the person or persons so applying for the same, during such time as the said last will and testament shall be so lost, and until the same shall be found and duly proven according to law, and no longer: *Provided*, that all affidavits to be made of the loss or destruction of any last will and testament, whereon to ground an application for letters of administration, pursuant to this law, shall be made before, and taken in writing by the person to whom such application is made, and signed by the parties swearing; and sworn to, shall be filed and recorded in the office of such person granting such administration.

A. D. 1787. No. 1470.

An Act to authorise Executors to sell and convey Lands of their Testator, &c.

WHEREAS doubts have arisen respecting the powers of executors to sell and convey the lands of their testator, where the said testator has directed that the same shall be sold, but has not declared by whom the said sale be made.

I. *Be it enacted*, that wherever any person has directed or shall direct, by his or her last will and testament, duly executed in the presence of
three

three or more credible witnesses, that his or her lands shall be sold for the payment of his or her debts, or for the purpose of distributing the money which may arise from the sale thereof among his or her legatees, then, and in every such case, it shall and may be lawful to and for the executors of such person, or the majority of such executors, as shall qualify on the said will, if no person is expressly named for that purpose, to sell and convey the said lands, agreeably to the intention of the testator.

II. If the executor or executors should die or renounce according to law, then, and in that case, the administrator or administratrix, with the will annexed, shall be authorised by this act to sell the real estate of the said deceased, as directed in and by the will.

A. D. 1787. No. 1490.

An Act to appoint Escheators, and to regulate Escheats.

VIII. WHERE any monies, or other personal estate, shall be found in the hands of an executor or administrator, being the property of any person heretofore deceased, or hereafter dying and leaving no person entitled to claim according to the statute of distribution, and without making disposition of the same, the escheator of the district where such chattels shall be found, or the attorney-general, on behalf of the state, shall and may sue for and recover, either at law or in equity, and pay the same into the treasury of this state; and the said treasurers for the time being shall advertise the same in the State Gazette, once in every month for 6 months, in like manner as lands are herein before directed to be advertised; and if no person shall appear and make good title to such personal estate within two years thereafter, other than as executor or administrator, or their legal representatives, then such personal estate shall become vested in and applied to the use of this state.

IX. Nothing herein contained shall prejudice the rights of individuals having legal title, and who may be under the disabilities of infancy, coverture, lunacy, or beyond the limits of the United States, until 3 years after such disabilities shall be removed.

XII. Every part of this act, and the mode therein prescribed for recovering and appropriating real or personal property heretofore escheated to this state; and to become hereafter fully vested by the verdict of a jury as aforesaid, shall be pursued and observed where any person shall hereafter die without heir, or shall forfeit his lands by conviction of treason, or otherwise become divested thereof by operation of law, without leaving any legal representative; any law, usage or custom to the contrary notwithstanding.

XIII. No property shall be vested in the state, or any inquisition had by the escheator, where any person or persons shall have committed or may commit any felony against the state; but that the said property shall descend to and be vested in the representatives of such person or persons; any law, usage or custom to the contrary notwithstanding.

A. D.

A. D. 1788. No. 1496.

*An Act declaring the Powers and Duties of the Enquirers, &c.
of Taxes.*

THE taxes imposed by any tax act shall be preferred to all securities and incumbrances whatsoever; and that in case any person shall happen to die between the time of giving in his or her account of his or her tax, and any goods and chattels of the deceased, to the value of the sum he or she was assessed at, shall come into the hands of his or her executors or administrators, they shall pay the same, by the time before limited, prior to all judgments, mortgages, and debts whatsoever, or otherwise a warrant of execution shall issue against the proper lands, goods and chattels of such executors and administrators.

A. D. 1789. No. 1557.

An Act to remedy the Defects of the Courts of Ordinary, &c.

WHEREAS there are no persons or courts having prerogative or peculiar jurisdiction, in cases or matters in which the ordinaries of the several districts where there are no county courts established, are respectively interested, by reason whereof the said ordinaries are at a loss and unable to qualify as executors of the last will and testament of any person or persons deceased, when they are respectively nominated and appointed, or to obtain administration of the goods and chattels, rights and credits of any person or persons dying intestate, to which administration the said ordinaries may be respectively entitled:

Be it enacted, that the ordinaries of Charleston, George-town, and Beaufort districts, when respectively appointed executors of the last will and testament of any person or persons deceased, within their several jurisdictions, and shall choose to take on them the burthen and execution thereof, they shall prove such last wills and testaments, and qualify as executors thereof, before one or more of the judges of the court of common pleas, either during term time or vacation; and in cases where the said ordinaries respectively may seek or require administration of the goods, chattels, rights, or credits of any person or persons dying intestate within their several jurisdictions, or administration, with the will annexed, either one or more of the said judges of the court of common pleas, in term time, or during the vacation, may have cognizance and jurisdiction of, and determine respecting the same, and grant letters of administration, if the said ordinaries should be thereunto respectively entitled, and take bond for due administration, and have and do all other acts and proceedings thereto incident.

Provided, that the said ordinaries respectively shall record, in their several offices, the last wills and testaments aforesaid, and probates thereof, and letters of administration, and all other proceedings in cases testamentary, and of administration, in the same manner as is practised with respect to cases where they may not be interested and concerned, after the same shall have been recorded in the office of the clerk of the district where such will shall be proved, or administration granted as aforesaid.

A. D.

A. D. 1789. No. 1578.

An Act for granting to the Circuit Courts complete original and final Jurisdiction, &c.

XVI. IN case any person or persons shall think themselves aggrieved by the judgment or sentence of the justices of the county court, or any person or persons possessing the power and authorities of ordinary, it shall and may be lawful for such person or persons to enter an appeal from such judgment or sentence, to the court of common pleas of the district in which such judgment or sentence shall be given: Provided the said appeal be entered in the same county court in which the judgment or sentence shall be given, or within 20 days after judgment or sentence by the ordinary, where no county courts are established, proof being made, to the satisfaction of the said ordinary, of the adverse party having notice thereof; and the said courts of common pleas shall hear and determine the said appeals, according to the customs, usage and practice in cases of appeal from the county courts.

A. D. 1789. No. 1582.

An Act directing the Manner of granting Probates of Wills and Letters of Administration, &c.

I. *BE it enacted*, that in the several counties throughout this state, where county courts are established, the justices thereof shall have and exercise the same power and authorities, in taking the probate of wills, and granting letters of administration, which have been heretofore used and exercised by the judges of the courts of ordinary of this state, and also such further powers and authorities as are herein after particularly mentioned; and in those counties where there are no county courts established, the judges of the courts of ordinary in the several districts of this state, shall have and exercise their usual powers and authorities, and also such as are herein given to the justices of the county courts.

II. Any person having right or title to any lands, tenements or hereditaments whatsoever, (feme coverts, persons of unsound mind, and infants excepted) may dispose thereof by will in writing, to be signed by the person devising the same, or some other person in his presence, and by his express direction, and attested and subscribed by three credible witnesses, in the presence of the said devisor.

III. No devise, in writing, of any lands, tenements or hereditaments, or any clause thereof, shall be revocable but by some other will or codicil in writing, or other writing, declaring the same, attested and subscribed by 3 witnesses as aforesaid, or by destroying or obliterating the same by the testator himself, or some other person in his presence, and by his direction and consent.

IV. No nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of £ 10. sterling, that is not proved by the oaths of 3 witnesses at the least, who were present at the making thereof, and bid by the testator to bear witness that such was his will, or words to that effect; nor unless such will was made in the last sickness of the deceased, in the house or place where he or she shall die.

V. No

V. No testimony shall be admitted to prove any nuncupative will, if 6 months shall have elapsed after speaking the pretended testamentary words, except such testimony, or the substitute thereof, were committed to writing within 6 days after the making of the said will; and then 12 months shall be allowed, and no more, for the probate of such will; but the same shall not at any time be received to be proved, unless process shall have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same if they please.

VI. No will in writing, concerning any goods or chattels, shall be repealed, nor any clause, devise or bequest therein be altered or changed by any words or will by word of mouth only, except the same be in the life-time of the testator committed to writing, and afterwards read to and allowed by him, and proved to be so done by three witnesses at the least. *Provided*, that any soldier in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate in like manner as before the making of this act.

VII. If any will in writing shall contain devisees of real estate, and also legacies of goods and chattels, and such will cannot be proved so as to pass the real estate, the same shall not for that cause be void as to the bequests of the goods and chattels.

VIII. If no provision shall be made by the will of the testator for any child or children that may be born after his death, such child or children shall be entitled to an equal share of all real and personal estate given to the other child or children, who shall contribute to make up such share or shares according to their respective interests or portions deriving to them under such will.

IX. If any child should die in the life-time of the father or mother, leaving issue, any legacy given in the last will of such father or mother shall go to such issue, unless such deceased child was equally portioned with the other children by the father or mother when living.

X. If any person making a will shall afterwards marry and die, leaving issue, it shall be deemed and taken to be a revocation of such will, to all intents and purposes whatsoever.

XI. When any person shall make a will in writing, without appointing any executor or executors therein, or such executor or executors shall refuse to qualify, the court where such will shall be proved, shall grant letters of administration with the will annexed, to such person or persons as would have been entitled thereto, if the deceased had died intestate; and if any person shall die intestate, the court of the county, or the ordinary of the district, where there are no county courts, where the will of such person, had he or she left one, would have been proved, shall grant letters of administration to them who shall be entitled thereto.

XII. If the testator shall have a mansion house or known place of residence, his or her will shall be proved in the court of the county, or before the ordinary of the district, in case there are no county courts where such house is, or place of residence was; but if the testator had no such place of residence, and lands are devised in the will, it shall be proved in the court of the county, or before the ordinary, as the case may be, where the lands lie, or in one of them, where there are lands

in several counties; and if the testator had no such place of residence, and there are no lands devised, then the will shall be proved either in the county where such testator died, or where the whole or greatest part of his or her estate shall be.

XIII. When any will shall be proved, or application is made for administration of the estate of any person dying intestate, the court shall direct executors or administrators to make out an exact inventory of the personal estate of the deceased, and shall appoint three or more reputable freeholders, who shall appraise the same on oath; which inventory and appraisement shall be returned to the next court to be held in the county, or to the ordinary of the district, in cases where there are no county courts, within such time as the ordinary shall limit; and if the goods lie in several counties, the court having jurisdiction shall order appraisement and appoint appraisers in each, which, when made, shall be transmitted by the appraisers to the court where the will was recorded or administration granted; and every appraisement made as aforesaid, may be given in evidence in any action against such executors or administrators, to prove the value of the estate, but shall not be conclusive if it shall appear, on a trial of the cause, that the estate was really worth or *bona fide* sold for more or less than such appraisement.

XIV. The appraiser shall be allowed 4s. and 8d. each by the day, whilst employed in appraising any estate, to be paid by the executors or administrators; which expence shall be allowed them in the settlement of their accounts.

XV. Where any executor or administrator shall die intestate, not having fully administered, the same court by whom the former probate or administration was obtained, shall determine the right, and grant letters of administration of the estate so unadministered.

XVI. In case any person die intestate, or the executors named in any will refuse to qualify, then the justices of the county court, or the ordinary of the district, as the case may be, having the right, shall grant administration of the goods of the testator or person deceased, to his or her relations, in the order following, in exclusion of all other persons, to wit; first, to the husband or wife of the deceased; and if there be none such, or they do not apply, then to the child or children, or their legal representatives; if none such apply, then to the father or mother; in default of them, to the brothers or sisters; in default of them, to such of the next of kindred of the deceased, at the discretion of the justices of the county court or ordinary, as the case may be, as shall be entitled to a distributive share of the intestate's estate; and in default of such, to the greatest creditor or creditors, or such other person as the court shall appoint. *Provided always*, that if any widow, after having obtained letters of administration as aforesaid, shall marry again, it shall be at the election of the justices of the county court or ordinary, as the case may be, to revoke the administration before granted, or join one or more of the next of kin in the administration with her.

XVII. If any person having in possession the will of a deceased person, shall neglect to produce the same to be proved, process, as for contempt, shall issue from the court where such will ought to be proved,

ed, and the person shall be fined and imprisoned until the will shall be delivered up.

XVIII. The clerk of the court before whom the will shall be proved, or administration granted, on the application of the executors or administrators, shall give to them a true copy of the order of such court respecting such probate or administration, certified under his hand, which shall be sufficient to entitle them to maintain actions for the recovery of possession of the estate therein mentioned.

XIX. When it shall be requisite to make sale of any part of the personal estate of testator or intestate, either for a division, payment of debts, or to prevent the loss of perishable articles, application shall be made to the court of the county, or ordinary, as the case may be, where the will was recorded or administration granted; whereupon such court may refuse or grant such order for sale, regulating the time, place and credit to be given in such manner as to do impartial justice to all persons interested therein; and if any executor or administrator with the will annexed, having power under the will to dispose of the estate, or any part thereof, shall take such security as shall clearly be proved to be insufficient at the time, such executors or administrators, and their securities, shall be liable to make good any loss or damages that the legatees or creditors may sustain, to be recovered by action on the case against such executors, or by action of debt on the bond of such administrators and their security, wherein such damages shall be assessed by the verdict of a jury.

XX. Every executor or administrator, with the will annexed, at the time of proving the will, or granting administration, shall take the following oath:

"I do solemnly swear, that this writing contains the true last will of the within named A. B. deceased, so far as I know or believe; and that I will well and truly execute the same, by paying first the debts, and then the legacies contained in the said will, as far as his goods and chattels will thereunto extend and the law charge me; and that I will make a true and perfect inventory of all such goods and chattels. So help me God."

And the administrator, with the will annexed, shall enter into bond, with good and sufficient security, to be approved by the court, in a sum equal to the value of the estate at least; the condition of which bond shall be in form following, to wit:

The condition of this obligation is such, that if the above bound C. D. administrator (with the will annexed) of the goods, chattels and credits of E. F. deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, or possession, or knowledge of the said C. D. or into the hands or possession of any other persons for him, and the same so made do exhibit into the said court of at such time as he shall be thereunto required by the said court, and the same goods, chattels and credits do well and truly administer according to law, and make a just and true account of his actings and doings when by law required, and further do well and truly pay and deliver all the legacies contained and specified in the said will, as far as the said goods, chattels and credits will

extend, and the law require; then this obligation to be void, or else to remain in full force. Which bond shall be made payable to the justices of the county court, and their successors, and recorded in the clerk's office, or to the ordinary of the district, as the case may be, and may be sued, from time to time, by any person injured by the breach thereof, until the whole penalty be recovered; and the damages sustained being assessed on such suit, by the verdict of a jury, may be levied by execution, and paid to the party for whom they were assessed.

XXI. Every administrator shall, in open court, when letters of administration are granted to him, take the following oath or affirmation, as the case may be, to wit:

"I do solemnly swear, or affirm, that A. B. deceased, died without any will, as far as I know or believe; and that I will well and truly administer all and singular the goods and chattels, rights and credits of the said deceased, and pay all his just debts, as far as the same will extend and the law requires me; and that I will make a true and perfect inventory of all the said goods and chattels, rights and credits, and return a just account thereof when thereunto required. So help me God."

And such administrator shall also enter into bond, with good security, to be approved by the court, in a sum equal to the full value of the estate, with the condition following:—

The condition of the above obligation is such, that if the above bound A. B. administrator of the goods, chattels and credits of C. D. deceased, do make a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of the said A. B. or into the hands or possession of any other person or persons for him, and the same so made do exhibit into the said court of —, when he shall be thereunto required, and such goods, chattels and credits do well and truly administer, according to law, and do make a just and true account of his actings and doings therein, when required by the said court, and all the rest of the said goods, chattels and credits which shall be found remaining upon the account of the said administration, the same being first allowed by the said court, shall deliver and pay unto such persons respectively as are entitled to the same by law; and if it shall hereafter appear that any last will and testament was made by the said deceased, and the same be proved in court, and the executors obtain a certificate of the probate thereof, and the said A. B. do in such case, if required, render and deliver up the said letters of administration; then this obligation to be void, or else to remain in full force.

Which bond shall be made payable to the justices of the county court and their successors, and recorded in the clerk's office, or to the ordinary of the district, as the case may be, and may be sued in like manner, as is prescribed in the preceding clause of this act in the case of bonds given by administrators with the will annexed; and if the justices of the county court, who were present at the time of granting letters of administration, or the ordinary of the district, as the case may be, shall fail to take bond and security as aforesaid, such justices or ordinary, as the case may be, shall be liable to be sued for all the damages arising from such neglect, by any person or persons interested in the estate.

XXII. The

XXII. The clerk of every county court, or ordinary of the several districts, as the case may be, shall, once in every year, in the months of January and February, return into the secretary's office of the state, a list of all probates and administrations granted in their respective courts within the preceding year; which shall express the date of the certificate of probate or letter of administration, name of the testator or intestate, names of the executors or administrators, and their securities, and penalty of their bond; which lists shall be carefully filed, those of each county and district separate from the rest, in the said secretary's office.

XXIII. If any person shall die after the first day of March, in any year, the slaves of which he or she was possessed, whether held for life or absolutely, and who were employed in making a crop, shall be continued on the lands which were in the occupation of the deceased, until the crop is finished, and then be delivered to those who have the right to them; and such crop shall be assets in the executors or administrators hands, subject to debts, legacies, and distribution; the taxes, overseer's wages, expences of physic, food and cloathing being first paid; and the emblements of the lands which shall be severed before the last day of December following, shall, in like manner, be assets in the hands of the executors or administrators; but all such emblements growing on the lands on that day, or at the time of the testator or intestate's death, if that happens after the said last day of December, and before the first day of March, shall pass with the lands. And if any person shall rent or hire lands or slaves of a tenant for life, and such tenant for life dies, the person hiring such land or slaves shall not be dispossessed until the crop of that year is finished, he or she securing the payment of the rent or hire when due.

XXIV. If the securities for administrators conceive themselves in danger of being injured by such suretyship, they may petition the court, to whom they stand bound, for relief; which court shall summon the administrator to appear, and thereupon make such order or decree as shall be sufficient to give relief to the petitioner.

XXV. If any person shall, by will, appoint his debtor to be his executor, such appointment shall not, in law or equity, be construed to be a release or extinguishment of the debt, unless the testator shall, in his will, expressly declare his intention to release the same.

XXVI. The debts due by any testator or intestate, shall be paid by executors or administrators in the order following, viz. Funeral and other expences of the last sickness, charges of probate of will, or of the letters of administration; next debts due to the public; next judgments, mortgages and executions, the oldest first; next rent, then bonds or other obligations; and lastly, debts due on open accounts; but no preference whatever shall be given to creditors in equal degree, where there is a deficiency of assets, except in the cases of judgments, mortgages that shall be recorded from the time of recording, and executions lodged in the sheriff's office, the oldest of which shall be first paid; or in those cases where a creditor may have a lien on any particular part of the estate.

XXVII. Every executor or administrator shall give three weeks notice, by advertisement in the State Gazette, or at three different places.

of

of the most public resort in the parish or county, for creditors to render an account of their demands, and they shall be allowed 12 months to ascertain the debts due to and from the deceased, to be computed from the probate of the will, or granting letters of administration; and creditors neglecting to give in a state of their debts within the time aforesaid, the executors or administrators shall not be liable to make good the same; nor shall any action be commenced against any executor or administrator for the recovery of the debts due by the testator or intestate, until nine months after such testator or intestate's death.

XXVIII. Executors or administrators shall annually, whilst the estate shall remain in their care or custody, at the first court to be held after the first day of January, render to the court of the county, or ordinary of the district, as the case may be, from whom they obtained probate of will, or letters of administration, a just and true account, upon oath, of the receipts and expenditures of such estate the preceding year; which, when examined and approved, shall be deposited with the inventory and appraisement, or other papers belonging to such estate, in the clerk or ordinary's office, as the case may be, there to be kept for the inspection of such persons as may be interested in the said estate; and if any executor or administrator shall neglect to render such annual accounts, he shall not be entitled to any commissions for his trouble in the management of the said estate, and shall moreover be liable to be sued for damages by any person or persons interested in the said estate.

XXIX. All and every executor or administrator shall, for his, her, or their care, trouble and attendance, in the execution of their several duties, take, receive or retain in his, her, or their hands, a sum not exceeding the sum of 50s. for every £ 100. which he, she, or they shall receive; and the sum of 50s. for every £ 100. which he, she, or they shall pay away, in credits, debts, legacies, or otherwise, during the course or continuance of their or either of their managements or administrations; and so in proportion for any sum or sums less than £ 100. Provided, that no executor or administrator shall, for his, her, or their trouble, in letting out any monies upon interest, and again receiving the same, be entitled to take or retain any sum exceeding 20s. for every £ 10. for all sums arising by monies let out to interest, and in like proportion for a larger or a lesser sum; nor shall any executors or administrators, who may be creditors of any testator or intestate, or to whom any sum of money or other estate may be bequeathed, be entitled to any commissions for paying or retaining to themselves any such debts or legacies.

XXX. The commissions given by this act shall be divided amongst executors and administrators in proportion to the services by them respectively performed, to be rated and settled by the justices of the county court who granted probate of the will, or letters of administration, or the ordinary of the district, as the case may be, if the executors or administrators cannot agree among themselves concerning the same.

XXXI. All and every person who, not being appointed executor or executors of the last will and testament of any person or persons deceased,

ceased, or not having administration of the goods and chattels, rights and credits of any person or persons deceased, and who shall nevertheless possess him or themselves, of the goods and chattels, rights and credits of any person deceased, and become executors of their own wrong, shall, and they are hereby made liable as trespassers, and shall be liable to be cited by any person or persons having right or claim to the property of the deceased, or creditors, by process from the county courts, where there are county courts established, or ordinary of the districts, where there are no county courts or court of chancery, to make discovery, and give account of all and singular the goods and chattels, rights and credits of the deceased, and shall be liable to make compensation and reparation for all the goods, chattels, estate or assets they may have wasted, or may have been lost by their illegal interference, or becoming executors of their own wrong as aforesaid, and shall be chargeable as far as assets have come into their hands, and be in every other respect liable and chargeable as executors of their own wrong at common law.

XXXII. And whereas the executors and administrators of such persons who have possessed themselves of considerable personal estate of other deceased persons, and converted the same to their own use, have no remedy by the rules of common law as it now stands, to pay the debts of those persons whose estates have been so converted by their testator or intestate, which hath been found very mischievous, and many creditors defeated of their just debts, although their debtors left behind them sufficient to satisfy the same, with great overplus: for remedy whereof,

Be it enacted, that from and immediately after the passing of this act, all and every the executors and administrators of any person or persons who, as executor or executors in his or their own wrong, or administrators, shall waste or convert any goods, chattels, estate, or assets, of any person deceased, to their own use, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living.

An Act for the Abolition of the Rights of Primogeniture, for the giving an equitable Distribution of the real Estate of Intestates, and for other Purposes therein mentioned.

I. WHEREAS the convention of this state, by the 5th section of the 10th article of the constitution, passed the third day of June, 1790, did direct, that the legislature should, as soon as might be convenient, pass laws for the abolition of the rights of primogeniture, and for giving an equitable distribution of the real estates of intestates; *be it enacted*, that the rights of primogeniture be, and the same is hereby abolished; and that when any person possessed of, interested in, or entitled to a real estate in his or her own right, in fee simple, shall die without disposing thereof by will, the same shall be distributed in the following manner;

II. If

II. * If the intestate shall leave a widow, and one or more children, the widow shall take one third of the said estate, and the remainder shall be divided between the "CHILDREN," if more than *one*; but if only one, the remainder of the estate shall be vested in that one absolutely for ever.

III. † The lineal descendants of the intestate shall represent their respective parents, and be entitled to receive and divide equally among them, the shares to which their parents would respectively have been entitled, had they survived the ancestor.

IV. ‡ If the intestate shall not leave a child, or other lineal descendant, but shall leave a widow and a father or mother, the widow shall be entitled to one moiety of the estate, and the father, or if he be dead, the mother shall be entitled to the other moiety.

V. § If the intestate shall not leave a lineal descendant, father or mother, but shall leave a widow and brothers and sisters, or brother or sister of the whole blood, the widow shall be entitled to one moiety of the estate, and the brothers and sisters, or brother or sister, to the other moiety, as tenants in common. The children of a deceased brother or sister shall take among them respectively the share which their respective ancestors would have been entitled to, had they survived the intestate.

VI. If the intestate shall leave no lineal descendant, father, mother, brother, or sister of the whole blood, but shall leave a widow, and a brother or sister of the half blood, and a child or children of a brother or sister of the whole blood, the widow shall take one moiety of the estate, and the other moiety shall be equally divided between the brothers and sisters of the half blood, and the children of the brothers and sisters of the whole blood; the children of every deceased brother or sister of the whole blood taking among them a share, equal to the share of a brother or sister of the half blood. But if there be no brother or sister of the half blood, then a moiety of the estate shall descend to the child or children of the deceased brother or sister. And if there be no child of a deceased brother or sister of the whole blood, then the said moiety shall descend to the brothers and sisters of the half blood.

VII. If the intestate shall leave no lineal descendant, father, mother, brother, or sister of the whole blood, or their children, or brother or sister of the half blood, then the widow shall take one moiety, and the lineal ancestor or ancestors, if any there be, the other moiety.

VIII. If the intestate shall leave no lineal descendant, father, mother, brother or sister of the whole blood, or their children, or brother or sister of the half blood, or lineal ancestor, then the widow shall take two thirds of the estate, and the remainder shall descend to the next of kin.

IX. || If the intestate shall leave no widow, the provision made for her

* This § is copied from the 5th §. c. 10. of 22 and 23 C. 2. down to the word "CHILDREN."

† Copied from the same statute.

‡ Copied from 6th § of the above statute, which is here improved on, and this is more explicit.

§ Copied from the same, 6th §.

|| Copied from 7th §. c. 10. of 22 and 23 C. 2. "in case there be no wife," &c. and again, "in case there be no child."

her shall go as the rest of his estate is directed to be distributed in the respective clauses in which the widow is provided for.

X. * In reckoning the degrees of kindred, the computation shall begin with the intestate, and be continued up to the ancestor common, and thence down to the person claiming kindred inclusively, each step being reckoned as one degree.

XI. On the death of any married woman, the husband shall be entitled to the same share of her real estate as is herein given to the widow, out of the estate of the husband, and the remainder of her real estate shall be distributed among her descendants and relations, in the same manner as is heretofore directed in case of the intestacy of a married man.

XII. If the intestate shall leave no husband, the provision herein made for him shall go as the rest of the estate is directed to be distributed in the preceding clauses.

XIII. † *And be it further enacted*, that in all cases of intestacy, the personal estate of the intestate shall be distributed in the same manner as real estates are disposed of by this act.

XIV. ‡ *And be it further enacted*, that nothing herein contained shall be construed to give to any child or issue (or his or her legal representatives) of the intestate, a share of his or her ancestor's estate, where such child or issue shall have been advanced by the intestate in his lifetime, by portions or portion, equal to the share which shall be allotted to the other children; but in case any child, or the issue of any child, who shall have been so advanced, shall not have received a portion equal to the share which will be due to the other children, (the value of which portion being estimated at the death of the ancestor, but so as that neither the improvements of the real estate by such child or children, nor the increase of the personal property, shall be taken into the computation) then so much of the estate of the intestate shall be distributed to such child or issue, as shall make the estate of all the children to be equal.

XV. *And be it further enacted*, that no lands or personal estate, which shall be acquired by any person, after the making of his or her will, shall pass thereby, unless the said will be re-published; but every such person shall be considered as having died intestate, as to the said lands and personal estate, and the same shall be disputable according to the directions of this act.

XVI. *And be it further enacted*, that where any person shall be, at the time of his or her death, seised or possessed of any estate in joint-tenancy, the same shall be adjudged to be several by the death of the joint-

* This is according to the Civil law. We used formerly to count according to the Canon law, which is the mode used in England, and which is now repealed by this clause.

† Q. Will not this operate as a repeal of the 10th c. of 22 and 23 C. 2? not entirely for the proviso to § 7. not allowing representation to collaterals; and the proviso, § 8. concerning distribution of goods 12 months after death of intestate, and providing for refunding shares of distribution, and § 9. that ordinary may grant letters of administration cum testamento annexo, are not repealed by this act.

‡ Copied partly from § 5. c. 10. of 22 and 23 C. 2. But this is an improvement on the British statute.

joint-tenant, and shall be distributed as if the same was a tenancy in common.

XVII. *And be it further enacted*, that in all cases where provision is made by this act, for the widow of a person dying intestate, the same shall, if accepted by her, be considered as in lieu of, and in bar of dower.

XVIII. *And be it further enacted*, that from and after the first day of May next, it shall and may be lawful to, and for any person who may be entitled to a distributive share of any estate, real or personal, and shall have arrived to the age of 21 years, or be married, to apply, by petition, to the court of equity, or common pleas, (at the option of the party) for a writ of partition, to be directed to certain commissioners, authorizing and requiring them to divide the said estate; and the court shall thereupon issue a writ of partition in the same manner as is directed for the admeasurement of dower, by an act, entitled, "An act for the more easy and expeditious obtaining the admeasurement of dower to widows, of the lands of which their deceased husbands were seised, in fee, at any time during their marriage." And the commissioners so to be appointed, being first duly sworn fairly and impartially to perform their duty, shall proceed to execute the said writ, and return the same to the court. And when the said estate cannot, in the opinion of the commissioners, be fairly and equally divided between the parties interested therein, without manifest injury to them, or some or one of them, then they shall make a special return of the whole property, and the value thereof truly appraised, and certify their opinion to the court, whether it will be most for the benefit of all parties to deliver over to one or more of the parties interested therein, the property which cannot be fairly divided, upon the payment of a sum of money, to be assessed by the said commissioners, or to sell the same at public auction; and the court shall proceed to consider and determine the same: and if it shall appear to the court, that it will be for the benefit of all parties interested in the said estate, that the same should be vested in one person, or more persons, entitled to a portion of the same, on the payment of a sum of money, they shall determine accordingly; and the said person, or persons, on the payment of the consideration money, shall be vested with the estate so adjudged to them, as fully and absolutely as the ancestor was vested. But if it shall appear to the court, that it would be more for the interest of the parties that the same should be sold, then they shall direct a sale to be made, on such a credit, and on such terms as to them shall seem right; and the property so sold shall stand pledged for the payment of the purchase-money.

XIX. *And be it further enacted*, that the judges of the respective county courts shall be, and they are hereby authorised, from time to time, to make such rules and orders as may be necessary for the purpose of carrying the foregoing clauses into effect.

XX. *And be it further enacted*, that this act shall commence its operation on the first day of May next, but not sooner. [A. A. passed 19th Feb. 1791.]

IV. AND, to furnish an adequate remedy at law against executors and administrators, in cases where one or more may be out of the state; *be it enacted*, that in cases where there are two or more executors or administrators to any estate, and any one or more of them hath withdrawn, or shall withdraw, or remove out of the state, it shall and may be lawful for any creditor, or person having right cause of action against such estate, to sue out his writ against all the executors or administrators, naming and setting forth therein the executors or administrators, one or more, who is or are out of the state; and the said writ being executed in the usual form upon those who are within the state, the suit shall be deemed to be good and effectual in law to all intents and purposes; saving only the judgment in such cases shall not extend to work any devastavit upon the person or persons so absent, to affect him, her, or them in their private right. [4 § of A. A. passed 21st Dec. 1793.]

It may not be improper to take notice of a few general Rules and Maxims, which have been laid down, by Courts of Justice, for the construction and exposition of Deeds and Wills. These are,

I. THAT the construction be *favourable*, and as near the minds and apparent intents of the parties as the rules of law will admit. For the maxims of law are, that "*verba intentioni debent inservire*;" and "*benigne interpretamur chartas propter simplicitatem laicorum*." And therefore the construction must also be *reasonable*, and agreeable to common understanding.

II. That *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*; but that, where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of words; *nam qui haerat in litera, haerat in cortice*. Therefore, by a grant of a remainder, a reversion may well pass, and *e converso*. And another maxim of law is, that "*mala grammatica non vitiat chartam*;" neither false English nor bad Latin will destroy a deed; which, perhaps, a classical critic may think to be no unnecessary caution.

III. That the construction be made upon the entire deed, and not merely upon disjointed parts. "*Nam ex antecedentibus et consequentibus sit optima interpretatio*." And, therefore, that every part of it be, if possible, made to take effect; and no word but what may operate in some shape or other. "*Nam verba debent intelligi cum affectu, ut res magis valeat quam pereat*."

IV. That the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party. "*Verba fortius accipiuntur contra proferentem*." As if tenant in fee-simple grants to any one an estate for life, generally, it shall be construed an estate for the life of the grantee: for the principle of self-preservation will make men sufficiently careful, not to prejudice their own interest by the too extensive meaning of their words; and hereby all manner of deceit in any grant is avoided, for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to

put their own construction upon them. But here a distinction must be taken between an indenture and a deed poll: for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, but the other party hath given his consent to every one of them. But in a deed poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him. And in general this rule being a rule of some rigour and strictness, is the last to be resorted to, and is never to be relied upon but where all other rules of exposition fail.

V. That if the words will bear two senses, one agreeable to, and another against law, that sense be preferred, which is most agreeable thereto. As if tenant in tail lets a lease for life generally, it shall be construed for his own life only; for that stands with the law, and not for the life of the lessee, which is beyond his power to grant.

VI. That, in a deed, if there be two clauses, so totally repugnant to each other that they cannot stand together, the first shall be received, and the latter rejected, wherein it differs from a will; for there, of two such repugnant clauses, the latter shall stand. Which is owing to the different natures of the two instruments; for the first deed, and the last will are always most available in law. Yet, in both cases, we should rather attempt to reconcile them.

VII. That a devise be most favourably expounded, to pursue, if possible, the will of the devisor, who, for want of advice or learning, may have omitted the legal and proper phrases. And, therefore, many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus, a fee may be conveyed without words of inheritance; and an estate-tail without words of procreation. By a will also an estate may pass by mere implication, without any express words to direct its course; as, where A devises lands to his heir at law, after the death of his wife. Here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication; for the intent of the testator is clearly to postpone the heir till after her death; and if she does not take it, nobody else can. So also, where a devise is of black-acre to A, and of white-acre to B, in tail; and if they both die without issue, then to C in fee: here A and B have cross remainders by implication, and on the failure of either's issue, the other, or his issue, shall take the whole; and C's remainder over shall be postponed till the issue of both shall fail. But, to avoid confusion, no such cross remainders are allowed between more than two devisees: and, in general, where any implications are allowed, they must be such as are necessary (or at least highly probable) and not merely possible implications. And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation to uses, is construed in each with equal favour and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law. [2 Black. Com. 379.]

INTRODUCTION.

TESTAMENT and *will*, strictly speaking, are not synonymous. A *will* is properly limited to land; and a *testament* only to chattels, requiring executors, which a will only for land doth not require. So every testament is a will; but every will is not a testament. *God. Orph. Leg. 4, 5.* The legislature of this state have very justly abided by this legal distinction, for they have declared *wills* or *testaments* made by feme-coverts are not good. *No. 597, p. 138, and No. 1582, p. 491, Pub. Acts.*

But Wentworth says it is called a will when there is an executor appointed; and when there is none, it is termed a testament. *Went. Off. Ex. 2.*

But as authors, in treating upon this subject, have not adhered to this distinction, so the words *will* and *testament* are herein used indiscriminately.

So also, the word *devise* seemeth properly applicable to lands; *bequest, bequeath, give, dispose*, and such like, to goods: yet, forasmuch as authors do generally confound them, and because that propriety of expression is not so much regarded in wills as in other legal instruments of conveyance, so long as the testator's intention doth sufficiently appear; therefore it hath not been thought necessary, in these different ways of expression, to observe a scrupulous exactness. The word *legacy*, in its ordinary signification, is applied to money; but it may signify a devise of land, and land may pass thereby. *Doug. 39.*

CHAP. I. *Who may not make a Will.*

THERE are three general descriptions of persons, who are incapable, by law or custom, to make a will, and therefore are obliged to die intestate.

- 1st. Such as want sufficient discretion.
- 2dly. Such as want sufficient liberty and free will.
- 3dly. Such as forfeit that right by their criminal conduct.

1st. Such as want sufficient discretion.

1. In the case of *Bishop and Sharpe, M. 1704*, in the court of chancery, it is said to have been agreed, that a female may make a will at 12 years; and a male at 17, or at 15, if proved to be a person of discretion. *2 Vern. 469.*

And one reason of limiting the same to the age of 17 may be, because (as it is agreed on all hands) that is the proper age at which a person is allowed to take upon himself the office of an executor; administration, during the minority of an infant executor, ceasing at that age.

An infant male at the age of 14 years, and female at the age of 12 years, may make a testament of goods and chattels. *God. O. L. 23.*

And in the case of *Hyde and Hyde, H. 8 Ann.* it is said to have been agreed, that a male infant of 14 years of age, and a female of 12 years of age,

age, might make a will of a personal estate; and it was said in this case, that it was so agreed by the lord keeper Wright in the case of *Sharpe* and *Sharpe*, wherein they followed the civil law of Justinian for their consent to marry at such ages. *Gilb. Rep.* 74.

And it is true, that Justinian fixes the *testamentary* age and the age of *puberty* alike, to wit, in the male at the age of 14, and in the female at the age of 12. But by the common law of England, the age of *discretion*, both in the male and female, is the age of 14; although the same common law admits of Justinian's distinction as to the age of *puberty* or consent to marriage.

And by the author of the *Law of Executors*, who is said to have been judge Dodderidge, it seems to be laid down generally, that an infant of the age of discretion, to wit, the age of 14 years, may make a will of goods and chattels. *Law of Ex.* 10.

And *Wentworth* thinks, that at the age of 14, being, in the judgment of law, the age of discretion, a person may make a testament. *Went.* 214.

Infants, under the age of 14 if males, and 12 if females, cannot make a testament: which is the rule of the civil law. For though some of our common lawyers have held that an infant of any age (even 4 years old) might make a testament, and others have denied that under 18 he is capable; yet, as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. 2 *Black.* 497.

But by the statute of the * 34 and 35 H. 8. c. 5. § 14. *Wills or testaments made of any manors, lands, tenements, or other hereditaments, by any person within the age of 21 years, shall not be taken to be good or effectual in law; for until that time, by the common laws of this realm they are accounted infants.* *Swin.* 74. 6th edit. And any person having right or title to any lands, tenements, or hereditaments whatsoever, (feme-coverts, persons of unsound mind, and infants excepted) may dispose thereof by will, &c. No. 1582, p. 490, *Pub. Acts.*

2. An idiot is excluded from making a testament. No. 597, p. 138, and No. 1582, p. 491, *Pub. Acts.*

Now, an idiot, or natural fool is he, who, notwithstanding he be of lawful age, yet he is so witless, that he cannot number to twenty, nor can tell what age he is of, nor knoweth who is his father or mother, nor is able to answer any such easy question; whereby it may plainly appear, that he hath not reason to discern what is to his profit or damage, nor is apt to be informed or instructed by any other: and such an idiot cannot make any testament, nor may dispose either of his lands or goods. *Swin.* 79.

3. *Mad folks and lunatic persons*, during the time of their furor or insanity of mind, cannot make a testament, nor dispose any thing by will; and the reason is most forcible, because they know not what they do: for in making of testaments, the integrity and perfectness of

* This section of the act of H. 8. is only declaratory of the common law of England, which common-law is specially declared of force here by 5th § of A. A. 1712, so that this principle prevails here: but this statute is also of force.

of mind, and not health of the body, is requisite. *Swin. 76. No. 597; p. 138, and No. 1582, p. 491, Pub. Acts.*

Howbeit, if these mad or lunatic persons have clear or calm intermissions, then, during the time of such their quietness and freedom of mind, they may make their testaments. *Swin. 76.*

And it is sufficient for the party which pleadeth the insanity of the testator's mind, to prove that the testator was beside himself before the making of the testament; although he do not prove the testator's madness at the very time of making the testament: the reason is, it being proved that the testator was once mad, the law presumeth him to continue still in that case, unless the contrary be proved. For, like as the law presumeth every man to be an honest man, unless the contrary be proved, and being proved, then he which is evil to be evil still; so, concerning *furor*, the law presumeth every man to have the use of reason and understanding, unless the contrary be proved; which being proved accordingly, then he is presumed, in law, to continue still void of the use of reason and understanding, unless the testator were besides himself but for a short time, and in some peculiar actions, and not continually for a long space, as for a month or more; or unless the testator fell into some frenzy upon some accidental cause, which cause is afterwards taken away; or unless it be a long time since the testator was assaulted with the malady: for in these cases the testator is not presumed to continue in his former furor of frenzy. *Swin. 78.*

Yet it is a hard and difficult point to prove a man not to have the use of understanding or reason: and therefore it is not sufficient for the witnesses to depose, that the testator was mad or besides his wits, unless they render or yield a sufficient reason to prove this their deposition; as that they did see him do such things, or heard him speak such words, as a man having reason would not have done or spoken. *Swin. 78.*

A very interesting cause was tried in England, on the 15th of June last, before Lord Loughborough, and a very respectable special jury of the county of Middlesex. The action was brought by William Greenwood, Esq; to invalidate the will of his late brother, John Greenwood, Esq; who, having conceived a notion, that the plaintiff and his sister had meditated a dark and wicked design to take away his life, excluded them from the whole of his fortune.

The recorder, on behalf of the plaintiff, opened the cause, and requested the particular attention of the jury to the circumstances by which it was distinguished. He stated, that the deceased, previous to his father's death, discovered the most tender affection for the plaintiff and his sister, and that they lived together in the greatest harmony; but that he was so overwhelmed with grief on account of the loss of his father, that the day after his death his countenance appeared remarkably dejected, and he complained of being ill; that he became suddenly shy of his brother and sister, to whom he imputed a design to take away his life by poison, but talked very reasonably on other subjects. The recorder said, he should prove that the nature of the deceased's insanity consisted in these groundless suspicions, which never left his mind to the day of his death, notwithstanding he was con-

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sidered to be perfectly restored to mental health, and capable of transacting the ordinary affairs of life. He should also call a number of respectable gentlemen, who would also bear testimony, that the uniform behaviour of the plaintiff towards his brother was the most kind and affectionate, and that he bore all his bitter and groundless reproaches with exemplary meekness, but discovered the greatest concern for the cause which produced them, and which he had endeavoured to remove, by calling in the most respectable medical advice.

Dr. Pitcairn was then called. He said he was sent for by the plaintiff, to attend his brother, the deceased, in April, 1786, a short time after his father's death. He found he had a fever upon him, and his head appeared much deranged. He prescribed the bark, and attended again the next day, when he found him in a state of delirium. His disorder produced a remarkable shyness, and strong apprehension of danger, insomuch that he was unwilling to see any person; and he had conceived a great aversion to the plaintiff, and to all the physical men about him. The doctor said, there was a species of insanity which created an aversion to those with whom the insane person had been most intimately connected, and for whom he had before entertained the greatest regard; and that sometimes these impressions remained on the mind for a long time after the person was restored to his understanding. He said, the deceased became so bad that it was dangerous to leave him alone, and therefore he advised a keeper to be sent for, which was accordingly done. He knew the family of the Greenwoods, which was an honourable and affectionate one.

Mr. Higginson, an apothecary, deposed, that he took particular notice of the deceased's countenance on the day his father died, and he observed it marked by a strong dejection. He attended a short time afterwards, when he told the witness he had been taking brandy and water, which had poisoned him. He visited him again the following day, when his looks were much altered, appearing perfectly healthy, and talked very reasonably and sociably with the plaintiff, who expressed his concern to the witness at the unjust suspicions entertained by his brother against himself and sister. Finding him grow worse, he advised the plaintiff to send for Dr. Pitcairn. He said, he never knew an instance of insanity without a particular antipathy, which was generally directed against their best friends.

Thomas Price, a keeper from Mr. Harris's mad-house, deposed, that he was sent for to take care of the deceased. He found him so bad that it was necessary constantly to be with him. He found a knife concealed in his bed, and another in his bosom. For his own safety, he was under the necessity of putting him under coercion, which the deceased imputed to the cruelty of the plaintiff; that his imaginations were so strong, that a plan was meditated to poison him, that he provided a tea-kettle of his own, which he always filled himself, from the pump, with water for his tea, and afterwards locked it up; and he would neither eat nor drink any thing without he first carefully examined it: that he made his escape out of a garret window, and went down to Cambridge, to his particular friend and tutor, the Rev. Mr. Jones, with whom he came back. The witness attended him till he appeared quite well.

The

The Rev. Mr. Jones deposed, that the deceased having, in July, 1786, escaped from his keeper, he came down to Cambridge, and sent for the witness, who went to him. He found him in an agony of grief. He embraced the witness affectionately, shed many tears, telling him he had been deserted by all his friends, and been used cruelly by the plaintiff, who had first accused him of want of duty to his father, and an attempt upon his life, and had afterwards confined him, and conspired to destroy him by poison. From his aspect and agitation the witness suspected his mind was disordered, and his suspicion was confirmed by finding that Price the keeper had been after him. He saw him several times after his recovery, which was in the spring 1787. He was perfectly collected and rational upon every subject, when the name of his brother was not mentioned, of whom he always spoke in terms of the greatest indignation, bestowing upon him the worst of epithets. The witness (for whom the deceased had the most cordial friendship) had frequently attempted, in vain, to remove his aversion to the plaintiff; but he would never listen to any thing in his favour, his reply generally being "you don't know half the wickedness there is in the world." The last time the witness saw him was in July, 1787, when he took an opportunity seriously to converse upon the subject of his late indisposition, and to convince him of the injustice of his suspicions against the plaintiff; but he was so angry with him for mentioning his brother as a good man, that he left him and never saw him afterwards.

The will of the deceased was read. It was executed in December, 1787, soon after which the testator died. It was written by himself, and drawn with legal accuracy. A journal also, written by the deceased, was read, which contained a long account of his father's death, and the treatment he himself received during his illness, in which there were many bitter expressions against the plaintiff, imputing his (the deceased's) indisposition to the medicines he was ordered to take, and which he declares were administered for the purpose of putting a period to his life.

Mr. Sergeant Bond then made an able address to the jury in support of the will, and said he should bring evidence to prove that the deceased was in full possession of his understanding when he executed it.

A great number of respectable men were called, who said, they were well acquainted with the deceased, and were often in his company in the year 1787. They did not observe the least marks of insanity in any part of his conversation or behaviour, but considered him in full possession of his mental faculties, and perfectly competent to make a will. Some of these witnesses had transacted law business with the deceased, and his mind appeared completely sound and collected; but several of them had observed his countenance to change, whenever the name of the plaintiff was mentioned, of whom he spoke with the bitterest animosity.

A gentleman of the law who attested the will in question, said the deceased appeared to be perfectly master of his senses when he executed it. He had known him some time, and never had the least cause to suspect that his understanding was in any degree affected.

Several

Several surgeons, who knew the deceased, and who had attended him occasionally, bore a similar testimony.

Lord Loughborough summed up the whole of the evidence in a masterly manner, making many excellent remarks upon it. His Lordship was inclined to believe, that the sum of the evidence afforded a strong presumption that the impression under which the deceased excluded the plaintiff from any part of his fortune, was marked by that insanity under which he laboured in 1787, and from which his mind had never been totally free.

The jury, without going out of court, pronounced a verdict for the plaintiff, and consequently the will is set aside.

The trial lasted from nine o'clock in the morning, till ten o'clock at night.

4. *E. 3. Ja.* in the star chamber, in *Gombe's* case, it was agreed by the judges, that **sane memory*, for the making of a will, is not at all times when the party can speak yea or no, or had life in him, nor when he can answer to any thing with sense; but he ought to have judgment to discern, and to be of perfect memory, otherwise the will is void. *Mo. 759.*

And in the case of the marquess of *Winchester*, *T. 41 Eliz.* it is said, that by the law it is not sufficient that the testator be of memory when he maketh his will, to answer to familiar and usual questions; but he ought to have a disposing memory, so that he be able to make disposition of his estate with understanding and reason: and this is such memory as the law calls sound and perfect memory. *6 Co. 23.*

But every person is presumed to be of perfect mind and memory, unless the contrary be proved, and, therefore, if any person go about to impugn or overthrow the testament, by reason of insanity of mind, or want of memory, he must prove that impediment. *Swin. 77.*

But if a man be of a mean understanding, neither of the wise sort nor of the foolish, but indifferent, as it were betwixt a wise man and a fool, yea, though he rather incline to the foolish sort; such an one is not prohibited to make a testament; unless he be yet more foolish, and so very simple and sottish, that he may easily be made to believe things incredible, or impossible, and hath not so much wit as a child may have of 10 or 14 years of age, who is therefore intestable by the law, for want of judgment. *Swin. 80.*

5. Amongst those persons disabled from making wills for want of discretion, may be reckoned such a person as is grown childish by reason of old age or distemper, or so forgetful that he forgets his own name. *Lovell's, p. 139. 6 Co. Rep. 23.*

6. He that is overcome with drink, during the time of his drunkenness, is compared to a madman; and, therefore, if he make his testament at that time, it is void in law. Which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding: otherwise, if he be not clean spent, albeit his understanding be obscured, and his memory troubled, yet he may make his testament being in that case. *Swin. 83.*

If a testator is in a state of insensibility when his will is attested,

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* See A. A. 1734, No. 597, p. 138, Pub. Acts.

the will is not duly executed, according to the meaning of the statute of frauds, although he be corporally present. *Right v. Price. Doug. 229.*

7. As persons who are born* blind, and deaf, and dumb, are incapable of making any will, so likewise are those who are deaf and dumb by nature, unless it do appear by sufficient arguments, that such person understandeth what a testament meaneth, and that he hath a desire to make a testament: for if he hath such understanding and desire, then he may, by signs and tokens, declare his testament. *Swin. 95. Law of Test. 44.*

8. Ayliffe says, generally, that persons who are blind cannot make their wills. *Ayl. Par. 531.*

But Swinburne says, he that is blind may make a nuncupative testament, by declaring his will before a sufficient number of witnesses. And he may make his testament in writing, provided the same be read before witnesses, and in their presence acknowledged by the testator for his last will. But if a writing were delivered to the testator, and he not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it may be that if he should hear the same read, he would not acknowledge the same for his will. *Swin. 96.*

And it seemeth best, that it be read over to the testator, and approved by him, in the presence of all the subscribing witnesses; and this the civil law did expressly require in the case of a blind man's will: But in England this strictness seemeth not to be precisely requisite, if there shall be otherwise satisfactory proof, before the court, that the identical will was read over to him, although it was not in their presence: And sometimes the single oath of the writer hath been allowed sufficient, by the court of delegates, to prove the identity of the will.

9. And what precautions are necessary for authenticating a blind man's will seem, in like degree, requisite in the case of a person who cannot read. For though the law, in other cases, may presume, that the person who executes a will, knows and approves of the contents thereof, yet that presumption ceaseth where, by defect of education, he cannot read, or by sickness he is incapacitated to read the will at that time.

Secondly. Such as want sufficient liberty and free-will.

10. Wills or testaments made by any feme-covert are not good or effectual in law. *No. 597, p. 138, and No. 1582, p. 491, Pub. Acts.*

Of goods and chattels, the wife cannot make her testament without the licence or consent of her husband; because, by the laws and customs of this realm, so soon as a man and woman are married, all the goods and chattels personal that the wife had at the time of the spousals or celebration of the marriage, or after, and also the chattels real, if he overlive his wife, belong to the husband, by reason of the said marriage, and therefore with good reason she cannot give that away which was her's, without the sufferance or grant of the owner. *Swin. 88, 89.*

And albeit the testament be made before the marriage, yet she being intestable at the time of her death, by reason her husband is then living, the testament is void; for it is necessary to the validity of such testament, that the testator have ability to make a testament, not only at the time of making thereof, when the testament receiveth its essence and being, but also at the time of the testator's death, when the testament receiveth its strength and confirmation. *Swin. 88.*

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And

* Lovelace, 141.

And albeit the wife do over-live the husband, yet the testament made during the marriage is not good; because she was intestable at the time of the will making: but if the testament being made during the coverture, she do *approve and confirm* the same *after* the death of her husband; in this case the devise is good, by reason of her *new* consent or *new* declaration of her will; for then it is as it were a *new* will. *Swin.* 88.

And although the will be made before marriage, and the wife survive the husband, yet it seemeth that the will shall not revive upon the husband's death. As in the case of Mrs. Lewis some years ago, before the delegates. Mrs. Lewis, a widow, made a will; soon after, she married again; in some time her second husband died, and she again became a widow, without any children by either husband. The will which she made in her first widowhood remained; and being found after her death, the question was, whether it was a good will or not. The counsel for the will cited many authorities from the civil law, and shewed, that among the Romans, if a man had made his will and was afterwards taken captive, such will revived and became again in force, by the testator's repossessing his liberty. But it was observed on the other hand, that marriage is a voluntary act, but captivity is the effect of compulsion. And the will was adjudged not to be good.—And in the case of *Forse and Hemblinge*, *M.* 30 & 31 *El.* (4 *Co.* 60, 61) it was said that if a man of sane memory make his will, and afterwards become of non-sane memory, this is no countermand of the will, because this is done by the act of God: but marriage is the voluntary act of the party, and amounteth, in law, to a countermand of the will.

But yet, nevertheless, upon the licence or consent of the husband, the wife may make her testament even of his goods. *Swin.* 89. *Love-lass*, 142.

But albeit the husband do give licence to his wife to make a will of his goods; yet he may revoke the same, not only at the making of the will, but after her death, at the least (*Swinburne* says) before the will be proved. *Swin.* 89.

And such his consent shall be implied until the contrary do appear; and if after her death he doth consent, he can never afterwards dissent; and if, immediately upon the death of the wife, he discourses and deals with the executor whom she hath appointed as executor, as in recommending to him a painter for escutcheons, a goldsmith for rings, or the like, this is a good assent, and makes it a good will; and though, after such assent given, he do, upon the sight of the will, dislike it, and oppose the probate, or enter a caveat, such disagreement shall not hurt the will: and when there is an express agreement or consent that a wife may make a will, a little proof will be sufficient to make out the continuance of that consent after her death; but it is necessary to prove a *disagreement* made, in a solemn and formal manner, in express words, and not by implication. *Gibs.* 461, 2.

But by lord Hardwicke, in the case of *Henley and Philips*, July 17, 1740, though a feme-covert has power of disposing of a sum of money, or any other thing, by a writing purporting to be a will; yet, after the

the wife's death, the proving it in the spiritual court will not give it the authority of a will; but it will still be considered as an instrument only, or an appointment of such sum or other thing in pursuance of the power; and before it is proved in the spiritual court as a testamentary conveyance, the husband ought to be examined there as to his consent; nor till then will it have the effect and operation of a will.
2 *Atk.* 49.

And when such a will was brought to the prerogative court to be proved, and a prohibition was prayed for the husband upon this suggestion, that the testatrix was a feme-covert, and so disabled by the law to make a will, it was granted; because, though the husband may, by covenant, depart from his right, and suffer his wife to make a will, yet, whether he hath done so or not, shall be determined by the common law *Gibbs.* 462.

If a woman have chattels real, these are not divested out of her into her husband by marriage; but in case she over-live him, they continue to her as before, *no alienation* or alteration having been made by the husband, who had power to dispose of them by gift in his life-time, though not by his will: yet such a woman, in her husband's life-time, cannot, of or for these things, without her husband's assent, make an executor or will; but she dying before him, they would, by the operation of law, accrue to him. *Went.* 198. *Law of Test.* 33.

Another kind of goods, or rather interest, a woman may have, to wit, debts or things in action, which, as the former, are not divested out of her by marriage into her husband, nor yet can she thereof make an executor without her husband's assent, although they be one degree farther from the husband than the said chattels real; for that, though the husband do over-live the wife, he shall not be entitled to them, as to the former. But if the wife makes him executor of these, as she may, or if, after her death, he takes out administration of her goods, then he is thereby entitled to them. *Went.* 199. *Law of Test.* 33, 34.

But it is said, if a woman hath pin-money, or a separate maintenance settled on her, and she, by management or good house-wifery, saves money out of it, she may dispose of such money so saved by her, or of any jewels bought with it, by writing, in nature of a will, if she die before her husband, and shall have it herself if she survive him, and the same shall not be liable to the husband's debts. *Swin.* a. 95. *Viner.* Baron and Feme. R. a. 16.

And although a feme-covert is so entirely under the power of her husband, that she cannot make what in propriety of speech is a will; yet she may make what is called an appointment. And the usual way is, for the intended husband to enter into a bond before marriage, in a penal sum, conditioned to permit his wife to make a will, and to dispose of money or legacies to such a value, and to pay what she shall appoint, not exceeding such a value; and in such case, if, after the marriage and during the coverture, she makes any writing purporting her will, and disposes legacies to the value agreed, though, in strictness of law, she cannot make a will without her husband; yet this is a good *appointment*, and the husband is bound by his bond to perform what is appointed. *Swin.* a. 94. 1 *Vern.* 244.

If

If the husband, before marriage, becomes bound in a bond, or covenants with some of the woman's friends, to give her such consent, he is bound by his bond, or covenant, so to do: but unless such consent be given to the *particular* will in question, it will not be complete, even though the husband beforehand hath given her permission to make a will; yet it shall be sufficient to repel the husband his general right of administering his wife's effects (which otherwise he has a right to*); and administration shall be granted to the wife's appointed,† or the person appointed by the wife. *Lovelass*, 143.

And in 1 *Mod.* 211. it is said, that the husband may bind himself by covenant or bond, to permit his wife by will to dispose of legacies, and this will be such an appointment as the husband will be bound to perform; yet it doth not operate as a will, neither ought it to be proved in the spiritual court; for the property passeth from him to her legatee, and it is his gift; and therefore if the legatee dieth before the wife, such legacy is not lapsed; for this in strictness is only the execution of a trust, and the executor or administrator of such legatee shall be intitled.

But in the case of *Jenkin v. Whitehouse*, M. 31 G. 2. by lord Mansfield Ch. J. in a cause of *Ross v. Ewer*, in chancery, July 5, 1744; there was a power to a feme-covert to appoint by will. And the lord chancellor held clearly, though such will operates as an appointment, that it must be proved in the spiritual court; and he would not proceed, till the will was so proved. He said, it was not material for him in that case to consider of the precise form in which it was to be proved, whether by a strict probate, or by granting administration, with the appointment, in nature of a will annexed; and therefore that point was not entered into; but the fact, that the paper was her will, in case she had power to make one, must be established by the ecclesiastical court; for such an appointment is in the nature of a will, and attended with all the consequences of a will. And as to the point, that money disposed under the execution of a power by such a will, should not lapse; this was fully considered, and contradicted, in the cause of the duke of Marlborough, v. the earl of Carlisle and others, Nov. 26, 1750.—The cases that have been cited in this cause shew, that administration may be granted, with the appointment annexed; which proves it to be testamentary. *For nothing can be annexed to an administration, but a testamentary disposition*; which is proved and established by the ecclesiastical court in that form. But if the question be, whether the wife had a power to make an appointment in the nature of a will, and thereby to deprive the husband of any benefit which, by law, would devolve upon him in consequence of her death; that is a question proper to be considered at law: and if she had no such power, this court will grant a prohibition. *Burrow*, 431.

When a married woman dies, who, by will or writing, hath disposed of effects by power derived from a bond, settlement, or will, before such will or writing of the woman's is proved in the ecclesiastical court, the ordinary will require the husband's consent, either in person, or by proxy, a person appointed by the husband for that purpose; and if

* *Lovelass*, 3.

† *Black. Com.* 1. v. 498.

that cannot be obtained (as sometimes the husband will absolutely refuse such consent,) then the ordinary will require the bond or settlement from which the wife derived her power, to be produced; and after abstracting it, will grant a probate or administration; that is, if the wife hath appointed an executor, the ordinary will grant a probate: if the wife hath not appointed an executor, but made only a kind of testamentary disposition in writing, then the ordinary will grant administration, with such testamentary disposition annexed: and in case the husband's consent hath not been obtained, but, instead thereof, the bond of settlement hath been produced, the contents thereof issue with the probate or administration from the ordinary. *Lovelass, 143.*

If, in the case where a feme-covert cannot make a testament without the husband's licence, the husband grants a licence to the wife to make a testament of a certain portion of his goods, and the wife so licensed, doth make one testament, and afterwards another, and perhaps a third or fourth; the licence shall be understood of the last testament, and not of the first. *Law of Test. 37.*

But if a feme-covert is executrix to some other person, and in that right hath divers goods and chattels; these are not divested out of her, because she hath them not merely to her own use, but as representing the person of another: and therefore in this case (Swinburne says) the wife may, for the continuation of the executorship, make an executor, and consequently a testament, without the consent or assent of her husband. *Swin. 89. Law of Test. 34.*

If the wife was executrix to another, then, as to the goods which she had in that capacity, administration must be granted to the testator's next of kin. *Lovelass, 3.*

But this rule, that a feme-covert executrix may make her will of those goods whereof she is executrix, is restrained in 2 cases.

The first is, where she doth not make an executor, but *bequeaths* the goods whereof she is executrix, by devise or legacy; in this case the will is void, because an executor may not dispose of the goods of the testator otherwise than to the use of the testator, to the payment of his debts and performance of his will, and therefore may not give or devise the same by legacy, for that were to dispose of the testator's goods as if they were the proper goods of the executor, and to convert the same to the private use of the legatee, and not the use of the testator. But when an executor doth only make another executor, the second executor doth stand chargeable and accountable for the distribution of the first testator's goods, to the use of the same testator as did the former executor, and is not, by the laws of the land, reputed for the executor of the executor, but of the former testator, and so is not a legatee. *Law of Test. 35, 36. Swin. 90.*

The second is, where she is not only executrix, but legatee also, and hath accepted of the thing bequeathed, not as executrix, but as legatee; and in this case the will of the feme-covert is also void. For she taking the thing bequeathed not as executrix, but as legatee, doth thereby make it her own proper goods, and consequently her husband's; and therefore cannot be given from him without his licence or consent. If it doth not appear whether the wife took the thing bequeathed as
executrix,

executrix, or legatee, it shall be presumed she took it as executrix. *Swin. 90. Law of Test. 36.*

And although a feme-covert, being executrix, may make her testament and appoint an executor of those goods which she hath as executrix, and not as legatee, without her husband's assent; yet the profit and fruit which arise out of those goods which she hath as executrix during the marriage, as calves, lambs, and such like profit of kine, sheep, and cattle, do belong to the husband, and not to herself as executrix; and therefore she cannot make her testament of such fruits and profit, without her husband's approbation. *Swin. 90. Law of Test. 36.*

H. 4 G. 2. King and Bettesworth. Mandamus to grant administration to *John Cullom*, of *Joan* his wife. Return; that by articles before marriage it was agreed, that the wife should have power to make a will, and dispose of her leasehold estate; that pursuant to this power, she made a will, and her mother executrix, who has duly proved the same. To this return it was objected, that she might have things in action not covered by the deed, and the husband was in all events entitled to an administration to them. On the other hand, it was insisted, that with the consent of the husband she might make a will; and here is his consent by being party to the deed. But by the court; a general consent to make a will doth not seem sufficient, but there should be a consent to that particular will: besides, this is going beyond her power, which did not extend to the making an executor. This is rather an appointment, which in equity will controul the administration as to the leasehold estate, than a will. And as there may be other effects not covered by the deed, the return is ill, and there must be a peremptory mandamus. *Stra. 891.*

11. That testament is to be repelled which is made upon just fear, that is, such a fear as may move a constant man; as the fear of death, or of bodily hurt, or of imprisonment, or of the loss of all, or most part of one's goods, or the like. Whereof no certain rule can be delivered, but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons, as well threatening as threatened; in the person threatening, his power and disposition; in the person threatened, the sex, age, courage, pusillanimity, and the like. But if the testator afterwards, when there is no cause of fear, do ratify and confirm the testament, it seemeth to be good in law. *Swin. 475, 476.*

If a man makes a will in his sickness, at the over-importunity of his wife, to the end he may be quiet; this shall be said to be a will made by restraint, and shall not be good. *Styl. 427.*

But if the person who makes the motion be not any ways suspected, and it also appears, by some conjectures, that the sick person had a desire to make his will; in this case the testament is good. *Law of Test. 53.*

12. *T. 1725. Stephenton and Gardiner.* A bill was brought to set aside a will relating to a personal estate only, and to stay the probate thereof, setting forth that the will was gained by fraud, and by misrepresenting the plaintiffs, who were the half brothers and sisters of the testatrix; and alledging, that the will was falsely read to her; and setting forth divers instances of fraud, on the part of the defendants, in procuring

curing this will. The defendants, as to that part of the bill which ought to set aside the will, and to stay the proceeding, demurred to the jurisdiction of the court; forasmuch as upon the face of the bill it appeared, that the plaintiffs were improper to sue here, in regard the spiritual court had the proper cognizance of wills relating to personal estates, and could determine fraud concerning them. After which, motions were made before the lords commissioners and the lord chancellor King for an injunction. But the court was against it: for the spiritual court hath jurisdiction of fraud relating to a will of personal estate, and can examine the parties, by allegation, touching this fraud; and if the will was falsely read to the testatrix, then it is not her will. *2 P. Will.* 286.

T. 1686. *Archer and Mosse.* The testator, when in perfect health, had made his will, and thereby gave to the plaintiff *Archer*, his nephew, the greatest part of his personal estate, to the value of £ 5000. But one *Bridget Sandyman*, his maid-servant, had in his sickness prevailed upon him to make another will, and to marry her a week before his death, when he lay in his sick bed, at six of the clock at night, though it was really proved by two ministers, that she was a year before actually married to the defendant *Mosse*, and was then his wife, and that *Mosse* procured the licence for the marriage of the testator to *Bridget*; and this will being set up by *Mosse*, executor to *Bridget*, (though it appeared that there was as gross a practice as could be in the gaining the will), the testator being *non compos mentis* both at the time of making the will and also at the time of the supposed marriage, and that in his health he knew that *Mosse* and *Bridget* were married, and that *Bridget* suppressed the first will; yet that will, so set up, being proved in the prerogative court, and the matter in question relating only to a personal estate, the lord chancellor was of opinion, that *whilst the probate stood, the matter was not examinable in chancery*; and though the fraud was fully proved and opened to him, he would not hear any proofs read, but dismissed the bill. *2 Vern.* 8.

But though a will gained by fraud, and proved in the spiritual court, is not to be controverted in equity; yet, if the party claiming under such a will comes for equity in the court of chancery, he shall not have it. *2 Vern.* 76.

M. 1715. *Gosse and Tracy.* It being urged, that a will concerning land is only triable at common law, and that the party there may take advantage of any fraud or imposition on the testator, and therefore not proper to be examined into or set aside in equity, upon pretence of fraud or surprize; the lord chancellor held, that there might be fraud in obtaining a will that *might* be relieveable in equity, and of which no advantage could be taken at law; as if a man agree to give the testator £ 2000. in bank bills, if he will devise his estate to him, and on the delivery of such bills makes his will, and deviseth his estate unto him, and the bills prove to be forged or counterfeited. *2 Vern.* 700.

But in the case of *Bransby and Kerridge*, July 28, 1728; in the house of lords, it was decreed, that a will of a real estate could not be set aside in a court of equity for fraud or imposition, but must be tried at law on *Devisavit vel non*, being a matter proper for a jury to inquire into. *Law of Test.* 60. *Win. Devise.* Z. 2.

13. Aliens being incapable of holding lands in this state, can never have any to dispose of; and the law of this state is so jealous of permitting lands to get into the hands of aliens, that although they are encouraged to lend money to our citizens, upon the security of a mortgage of leasehold or freehold estates, yet they are declared to be incapable of obtaining the actual possession, either directly or indirectly, or to foreclose the equity of redemption. *No. 1352, p. 353, Pub. Acts.*

But aliens may acquire a property in goods, money and other personal estate, and dispose thereof by will, provided they are alien friends, or such whose countries are at peace with our's; for alien enemies have no rights, no privileges, unless by special favour, during the time of war. *Black. Com. vol. i. p. 372.*

Thirdly. Such as forfeit that right by their criminal conduct.

14. Whosoever is lawfully convicted of *high treason*, by verdict, confession, outlawry, or presentment; besides the loss of his life, shall forfeit all his goods and chattels, and all such lands, tenements, and hereditaments as he shall have in his own right, use, or possession, of any estate or inheritance, at the time of such treason committed, or at any time after; and so consequently is intestable. Insomuch that traitors are not only deprived of making any testament, or other kind of last will, from the time of their conviction; but also the testament before made doth, by reason of the same conviction, become void, both in respect of goods, and also in respect of lands, tenements, and hereditaments. *Swin. 97.*

And the 12th § A. A. 1787, (Escheat law) enacts, that where any person shall forfeit his *lands* by conviction of treason, such property shall be recovered by the escheator, for the benefit of the state; so that any will made by a traitor, in respect of *lands*, is void by this act. *No. 1490, p. 430, Pub. Acts.*

But if any person, being attainted of treason, obtain a pardon, and be thereby restored to his former estate, then may he make his testament, as if he had not been convicted: or if he make any before his conviction and condemnation, the same, by reason of such pardon, recovereth its former force and effect. *Swin. 97.*

But if a traitor hath goods as executor to another, the same are not forfeited: whence it follows, that of such goods he may make his will. *Swin. 97.*

By the act of Congress, passed 30th of April, 1790, no conviction or judgment for treason, or misprison of treason, shall work any forfeiture of estate. *Brown's Laws of U. S. vol. i. p. 151. § 24.*

15. Felons, lawfully convicted, cannot make any testaments, or other dispositions of any goods or lands; because the law hath disposed thereof already. *Swin. 98.*

If a man do willingly kill himself, his testament (if he made any) is void. *Swin. 106.*

But, by the escheat law before recited, persons guilty of *felony* shall not forfeit their *property*; but it shall descend to the representatives of such felons. A. A. 1787. *No. 1490, p. 430, Pub. Acts.*

Q. Whether this deprives the felon of the right of making a will; and whether the property must actually descend, agreeable to the express terms of the act, to his representatives?

CHAP. II. *Of what Things a Will may be made.*

1. LORD Coke says, at the common law (by which he must be understood to signify the common law since the conquest) no lands or tenements were devisable by any last will and testament, nor ought to be transferred from one to another, but by solemn livery of seisin, matter of record, or sufficient writing. *1 Inst. 111.*

And by the statute of * 27 H. 8. c. 10. the power of disposing *land* by will is clearly taken away; whereupon the legislature, in the year 1734, enacted, that all former wills and testaments heretofore made, concerning any lands, tenements, or hereditaments, are good in law, according to the purport of the same, as fully and effectually as if the statute of 32 H. 8. c. 1. and 34 H. 8. c. 5. were of force in this province at the time of making said wills, &c. provided that the statute of † entails, and no part thereof, shall be construed to be of force here; nor shall estates, which were fee simple conditional at common law, be construed to be estates in tail: and provided, that nothing in this act shall be construed to make good any wills heretofore made in this province, since the statute of ‡ 29 C. 2. c. 3. has been made of force here, if such wills are not agreeable thereto. *No. 597, § 1, p. 139.*

And from the ratification of this act, every person, having any estate or interest in fee simple, or any such estate in coparcenary, joint-tenancy, or tenancy in common, of, and in any lands, tenements, rents, services, or other hereditaments, in possession, reversion, or remainder, may give, dispose, will, or devise, to any person, or persons (*except bodies politic and corporate,*) by his last will and testament in writing, and duly executed according to 29 C. 2. c. 3. as much as in him of right belongs, is or shall be, all his said lands, tenements, &c. at his and their own free will and pleasure. § 2.

And any person having right or title to any lands, tenements, or hereditaments whatsoever, may dispose thereof by will. *No. 1582, § 2, p. 491.*

And by A. A. of 1712, it is enacted, that all tenures be turned into free and common socage. *No. 331, § 5, p. 99, Pub. Acts.*

2. By the statute of the 29 C. 2. c. 3. § 12. *Any estate pur auter vie, shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed, in the presence of the deviser, by three or more witnesses: and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.* *No. 331, p. 83, Pub. Acts.*

Pur auter vie] That is, being held by lease during the life of another person.

I

Special

* Made of force here by No. 331, p. 50, Pub. Acts.

† West. 2. 13 Ed. 1. c. 1.

‡ Made of force by No. 331, p. 82.

Special occupant] A special occupant is, where an estate for life is made to a man and his heirs; in such case, the heir shall have the estate, after the decease of his ancestor, as special occupant, or as a person particularly described, to whom the estate shall go after the lessee's death.

3. One that hath money to be paid to him on a mortgage, may devise this money when it comes. *God. O. L. 391.*

And if the feoffee in mortgage, before the day of payment which should be made to him, maketh his executors, and die, and his heir entereth into the land as he ought; it seemeth in this case, that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee: but yet the words of the condition may be such, as the payment shall be made to the heir; as if the condition were, that if the feoffor pay to the feoffee, or to his heirs, such a sum at such a day, there, after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir at the day appointed. *1 Inst. 209, 210.*

And hereby it appeareth, that the executors do more represent the person of the testator, than the heir doth that of the ancestor; for though the executor be not named, yet the law appoints him to receive the money, but so doth not the law appoint the heir to receive the money, unless he be named. *1 Inst. 209, 210.*

4. If upon articles for a purchase, the purchaser die, having devised the land before a conveyance executed, the land will pass in equity; for the testator had an equity to recover the land, and the vendor stood trustee for the testator, and as he should appoint, till a conveyance executed. *1 Chanc. Cas. 39. 2 Vern. 679.*

For the vendor of the estate is, from the time of his contract, considered as a trustee for the purchaser; and the vendee, as to the money, is considered as a trustee for the vendor. *1 Atkyns, 573.*

So, if a man covenants to lay out a sum of money in the purchase of lands, generally, and deviseth his real estate before he hath made such a purchase, the money to be laid out will pass to the devisee. *Id.*

But if a man, having made his will, afterwards contracts for the purchase of lands, the lands contracted for will not pass by the will, unless the said will be republished; but every such person shall be considered as having died intestate as to the said lands; and the same shall be distributable, according to the directions of the act of assembly in that case made and provided. *A. A. 19 Feb. 1791.*

But if a good title cannot be made of the lands; as the heir in such case cannot have the lands, so he shall not have the money intended to be laid out. *1 Atkyns, 573.*

5. If a man have a lease for never so many years, determinable upon life or lives, that is, if such or such live so long; this estate may well enough be given and disposed by will, because it is but a chattel. *Went. 19.*

6. If one having a lease for many years, as an 100, 500, more or less, doth devise and bequeath the same to A, and the heirs male of his body, and for want of such issue to B, and the heirs male of his body, and A dieth, having issue a son, the term shall not go to his son, but to his

his executor or administrator; for it cannot be made a matter of inheritance. So if *A* had died without issue male, the term should not have gone or remained to *B*, but to the executor or administrator of *A*. *Went.* 45.

So, if any hereditament, granted or devised to one, and his heirs, for 100 years; or if such a term grant a rent out of the land to *A* and his heirs, or to the heirs, or heirs male of his body, yet shall the same go to the executor, and not to any heir; for it being derived out of a chattel, cannot be any freehold or inheritance, but is itself a mere chattel. *Went.* 54.

If a man is possessed of a term for years, in right of his wife, as executrix of her former husband, he has power to grant and convey the same. 3. *Wils.* 277.

7. Albeit, by deed of gift made in the life-time of any person to another, of all his goods and chattels, *debts*, or *things in action*, do not pass; yet, if the testator, by his last will and testament, do give or bequeath to another any *debt* due unto him, or a *thing in action* belonging unto him, the legacy is good and effectual in the law, and may be recovered in this manner; that is to say, if the testator do make the legatary executor of that particular debt or thing in action bequeathed, then the legatary, as executor thereof, may commence suit in his own name, and recover the same to his own use, against him by whom it was due: but if the testator do not make the legatary executor of the debt or thing in action bequeathed, then his remedy lieth in the ecclesiastical court, where he may convent the executor, and compel him either to sue for that debt in a court competent, and upon recovery and payment thereof to pay it over to the legatary, or else to make a letter of attorney to the legatary for the recovery of the debt or thing in action bequeathed in the name of the executor, to the use of the legatary. *Swin.* 187, 188.

Testatrix, by will, forgives her son-in-law a debt upon bond, and orders it to be delivered up; her son-in-law dies in her life-time, his representatives shall have the bond delivered up: although the bond would have been assets in the hands of the executor in respect to creditors. 1 *Wils.* 178.

8. Albeit the testator have no such thing of his own as is bequeathed, yet, nevertheless, the legacy is good in law: therefore, if the testator do bequeath a horse or a yoke of oxen, the legacy is good in law, though the testator have neither horse nor ox of his own. But *who shall make choice*, in this case, of the thing so bequeathed? is a question not to be neglected: and the solution is this; that if the words of the devise be directed to the legatary, as if the testator shall thus say, I will that *A B* shall have a horse, the choice doth belong to the legatary; but if the words be directed to the executor, as if the testator shall thus say, I will that my executor give to *A B* a horse, the election doth belong to the executor. Provided, nevertheless, that to whomsoever the election doth belong, whether to the legatary, or to the executor, they must not be unreasonable in their election, but frame themselves according to the meaning of the testator; otherwise the legatary might make choice of the best horse in the country, and the executor of the worst, contrary to the meaning of the deceased. *Swin.* 188.

9. If

9. If there be two joint-tenants, or tenants in common, of *lands*, and one of them deviseth that part which belongs to him, and dies, this is a good devise, and the devisee shall take such devise after the death of the devisor; and the surviving joint-tenant shall not take the whole by prior title. *No. 597, § 2, p. 139, Pub. Acts.*

Where any person shall be at the time of his or her death, seised or possessed of any estate in joint-tenancy, the same shall be adjudged to be severed by the death of the joint-tenant, and shall be distributed as if the same was a tenancy in common. *A. A. 19 Feb. 1791.*

But a man cannot give or bequeath, by will, any of those goods or* chattels which he hath jointly with another; for, if he should bequeath his portion thereof to a third person, this bequest is void; and the survivor, who had those goods or chattels jointly with another, shall have that portion so bequeathed, notwithstanding the said will. *Swin. 189.*

But otherwise it is with tenants in common. *God. O. L. 131.*

But as to joint-merchants, for the wares, merchandizes, debts, or duties, that they have as joint-merchants or partners, the same shall not survive, but shall go to the executors or administrators of him that dieth, by the law of merchants, which is part of the laws of this realm, for the advancement and continuance of commerce and trade, as being for the public good. *Co. Litt. 182.*

And, for the encouragement of husbandry and trade, it is held, that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common, and not as joint property; and there shall be no survivorship therein. *Black. Com. 2. v. 399.*

10. By 4 § of No. 597, widows may bequeath, by will, the crop or corps standing or growing on the grounds of their dowers, or on other lands planted for their use. *P. 139. Pub. Acts.* And this is only in affirmance of the common law. *2. Inst. 80.* But by the † 27 H. 8. c. 10. a married woman, having a jointure, shall not have any dowry of the residue of her husband's lands. Nor shall the widow of a person dying intestate, where provision is made by this act for her, be entitled to dower if she accepts such provision. *6 § A. A. 1791.*

A parson may, by will, bequeath the crop or crops growing or standing on his glebe land. *4 § No. 597, p. 139, Pub. Acts.*

But if the testator is lessee for years, and sow the land a short time before his lease expires, and then dies, before the corn can possibly be ripe within the term, in this case a devise thereof is void, because he himself could not have reaped it after the expiration of the term, if he had lived. *Swin. 191.*

11. Not only that thing may be devised or bequeathed by the testator, which is truly extant, or hath an apparent being at the time of the making of the will, or death of the testator; but that thing also which is not in *rerum natura*, whilst the testator liveth: therefore it is lawful for the testator to bequeath the corn which shall be sown or grow in such soil after his death, or the lambs which shall come of his flock

* Personal chattels are intended.

† In force here.

flock of sheep the next year, depasturing in such a field. But if there be no such corn growing in that soil, nor any lambs arising out of that flock, then the legacy is destitute of effect, because no such thing is extant at all, as was bequeathed. But if the testator devise a certain quantity of grain or number of lambs, as, for the purpose, twenty quarters of corn, or twenty lambs, and doth will and devise, that the same shall be paid out of the corn which shall grow in such a field, or arise out of his sheep depasturing in such a ground; though not so much or no corn at all there grow, or not any or not so many lambs there arise, yet, nevertheless, the executor is compellable by law to pay the whole legacies entirely; because the mention of the soil and of the flock was rather by way of demonstration than by way of condition; rather shewing how, or by what means, the said legacy might be paid, than whether it should be paid at all. *Swin. 186.*

12. Those things which, after the death of the testator, descend to the heir of the deceased, and not to his executor, cannot be devised by testament, except in such cases wherein it is lawful to devise the lands, tenements, or hereditaments. And therefore, if a man seised of land in fee or fee-tail, bequeath his trees growing upon the said land at the time of his death, this devise is not good, except as before; but if he devise the corn growing upon the same land at the time of his death, from the heir to some other person, this devise is good, albeit the land whereupon it groweth be not devisable. And the reason of the difference is, because the trees are parcel of the freehold, and descend together with the land to the heir, and not to the executor: but it is not so of corn; for the same shall go to the executor as parcel of the testator's goods. And therefore, if a man be seised of lands in the right of his wife, and sow the land, and devise the corn growing upon the same land, and die before the corn be reaped; in this case the legatary shall have the corn, and not the wife: But it is otherwise of grass, and herbs not separated from the ground at the time of the death of the testator. If a man, seised in fee in right of his wife, do let the same lands for years to a stranger, and the lessee soweth the ground, and afterwards the wife dieth, the corn not being ripe; in this case the lessee may devise the same corn, notwithstanding his estate be determined. So also of tenant by curtesy, and tenant in dower. *Swin. 190.*

And forasmuch as those things which, after the death of the testator, descend to the heir and not to his executor, are not devisable by will, except in such cases where lands, tenements, and hereditaments be devisable; therefore, those things which are affixed unto the freehold, are no more devisable than the freehold itself, as the windows, doors, wainscot, and such like. *Swin. 191. 4 Co. 64.*

So, if a man be seised of a house, and possessed of divers *heir-looms*, that, by custom, have gone with the house from heir to heir, and by his will deviseth away these heir-looms; this devise is void: for the will taketh effect after his death; and by his death, the heir-looms, by ancient custom, are vested in the heir, and the law prefers the custom before the devise. *1 Inst. 185.*

13. The testator may devise all goods and chattels which he hath in his

his own right, but not those which he hath in the right of another as executor. *Swin.* 185.

14. An administrator cannot make a testament of those goods which he hath as administrator, to any person dying intestate; because he hath not any such goods to his own proper use, but ought therewithal to pay the debts of the dead person, and to distribute the rest according to law. *Swin.* 189.

15. The husband cannot devise such goods as his wife hath as being executrix to another; nor such things as are in action, as debts due to her before marriage by obligation or contract, unless he and his wife recover the same during marriage, or that he renew the bonds, and take them in his own name; otherwise, after his death, they remain to her. *1 Inst.* 351.

But the husband may, at any time during the coverture, release a bond given to his wife. And where the husband makes a *settlement*, the bonds to his wife, being part of her fortune, will, notwithstanding his death, in the life-time of his wife, before the security be changed, be decreed in equity to his executor; he being considered, in that case, as a purchaser for a valuable consideration. *Cases in the time of L. Talb.* 168.

And although a man may, by will, dispose of all the personal chattels a woman is possessed of, as they immediately vest in him on marriage, yet her chattels real he cannot dispose of by will, until he has made them his own, which he may at any time, if he pleases: for unless he exercised some act of ownership to make them his own, as in case of leasehold estates for years, or for years determinable upon lives, he may surrender the leases, and take new leases, or sell the estates, and repurchase them; they will not pass by his will, but, on his death, will return to his wife; which, if he survives her, will be his own to all intents. *4 Co. Rep.* 51.

Neither can a husband dispose, by will, of the wife's paraphernalia. *Lovelass,* 36, 129.

Nor can a wife be barred of her dower by her husband's will, unless, after his death, she accepts of any thing given her thereby, as, in lieu or satisfaction for her dower. *Id.* 133; and 6th § *A. A.* 1791.

16. No lands, or personal estate, which shall be acquired by any person after the making of his will, shall pass thereby, (unless the said will be re-published; but every such person shall be considered as having died intestate, as to the said lands and personal estate; and the same shall be distributable according to the directions of this act. *A. A.* 19 Feb. 1791.

If a man maketh his will, and *deviseth* therein *all* the lands which he shall have *at the time of his death*; and after that, he *purchaseth* lands, and dieth without republication, or *making a new will*; in this case, though his intent to the contrary is very apparent, yet it is a void devise: for a man cannot devise any lands but what he hath at the time of making his will. And this was adjudged, upon great deliberation, by Holt, chief justice, and the court, in the case of *Bunker and Cook*; and the judgment was affirmed afterwards upon a writ of error in the house of lords, Feb. 24, 1707. *Gilb.* 122.

But,

But, by Holt, chief justice: If he *republisheth* his will, in such manner, and with such circumstances, as are necessary to complete execution of an original will, then the purchased lands will pass, as by an original will. 11 *Mod.* 127. And, in truth, this seemeth to make it a new will, to all intents and purposes; and not a republication of, *the old one.*

When a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property he is seised of at the date of the republication, just the same as if he had had such additional property at the time of making his will. Therefore, if one devises lands by the name of B, C and D, and purchases new lands, and republishes his will, the republication does not concern such new lands, because the will speaks only of the particular lands B, C and D. But if the testator, in his will, says, I give *all* my real estate, a republication will affect such newly purchased lands, because it is then the same as if the testator had made a new will. *Heylyn vs. Heylyn.* *Cowper.* 130.

One devises, by will, all the residue of his estate, of what kind or quality soever, to W. P. and afterwards purchases copy-hold lands, and surrenders them to such uses as he shall, by his last will, declare, limit and appoint. He afterwards makes a codicil, and thereby ratifies and confirms all and every the gifts, devises and bequests in his said will, except what he had altered in the codicil, and desires the codicil may be annexed to and taken as part of his will, to all intents and purposes. This amounts to a republication of the will, so as to make the after-purchased copy-hold lands pass by the residuary devise. *Doe and Davy.* *Cowp.* 158; and *Doug.* 690, 691. *Note.*

But a *codicil*, which concerneth only personal legacies, will *not* amount to a republication of the will, so as to pass lands purchased after the making of the will. 2 *Vern.* 625.

If a man deviseth all his lands *for payment of his debts*, and purchaseth lands afterwards, the lord keeper said he would decree a sale, though there were no precedent articles. 2 *Cha. Ca.* 144.

If a man hath a *lease*, and disposeth of it (specifically) by his will, and after surrenders it and takes a new lease, and after dies, the devisee shall not have this last lease, because this was a plain countermand of his will. *Golds.* 93.

But in the case of *Stirling* and *Lydiard*, Nov. 21, 1744, where a man devised *all and singular his leasehold estate, goods, chattels, and personal estate whatsoever*, and afterwards renewed a lease, it was held, by the lord chancellor Hardwicke, clearly, that the leasehold estate passed by the will. He said, the objection against its passing proceeded upon a mistake, that this is a specific legacy; but it is nothing like it: for it is only an enumeration of the several particulars of his personal estate, and is a general devise of the whole. It hath no appearance of a revocation. Suppose the testator had purchased a new lease, would not that have passed? Why, then, should not a new term in a lease equally pass? If I were to construe this a revocation, I do not know but if a man were to give all his bank, East-India, and South Sea stock, and should

should afterwards turn it into money, it might as well be insisted that this was a revocation. 3 *Atk.* 199.

If a man deviseth a *term for years*, which he hath not at the time of the devise, but purchaseth some time before his death; Holt, chief justice, doubted whether this would be good. But Mr. Peere Williams says, that notwithstanding the doubt which the court of king's bench seems to have been in in that case, it hath been clearly held to pass by such a will. 3 *P. Will.* 169.

This is undoubtedly good law in England, "*where a man may dispose of his chattels and personal estate that he shall, for the future, acquire after the making of his will, to the time of his death: Gilb. 122. for a term, even if it should be for a thousand years, is only a chattel, and reckoned a part of the personal estate. Co. Litt. 46.*" But the act of assembly above quoted has altered this principle with us. *A. A. 19 Feb. 1791.*

CHAP. III. *Form and Manner of making a Will.*

1. By the 29 *C. 2. c. 3. § 5.* entitled, An act for prevention of frauds and perjuries, *All devises and bequests of any lands, or tenements, deviseable either by force of the statute of wills,* or by this statute, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by 3 or 4 credible witnesses; or else they shall be utterly void and of none effect.* No. 331, p. 83, *Pub. Acts.*

No wills, made before the 9th of April, 1734, and after the 12th of December, 1712, (the time when the 29 *C. 2. c. 3.* was made of force here) shall be good, unless they were made agreeable to the last mentioned statute. No. 597, § 1, p. 139, *Pub. Acts.*

After the 9th of April, 1734, every person, having any estate or interest in fee-simple, or any such estate in coparcenary, joint-tenancy, or tenancy in common, in any lands, tenements, rents, services, or other hereditaments, in possession, reversion, or remainder, may give, dispose, will, or devise, to any person, (except bodies politic or corporate) by his last will and testament, in writing, and duly executed, according to an act made in the 29th year of *C. 2d.* for preventing of frauds and perjuries, as much as in him of right belongs; is, or shall be, all his said lands, tenements, &c. or any of them, at his own free will and pleasure. No. 597, § 2, p. 139, *Pub. Acts.*

Any person, having right or title to any lands, tenements, or hereditaments whatsoever, (feme-coverts, persons of unsound mind, and infants excepted,) may dispose thereof by will, in writing, to be signed by the person devising the same, or some other person in his presence, and by his express direction, and attested and subscribed by 3 credible witnesses, in the presence of the said devisor. No. 1582, § 2, p. 491, *Pub. Acts.*

Signed] Signing being only mentioned, therefore *scaling* is not necessary, although it be *expedient* to a testament; which is not properly and

* 32 *H. 8. c. 1.* and 34 *H. 8. c. 5.* neither of which are in force here.

and legally a deed, to which a seal is *essential*, though it hath the force and virtue of a deed. *God. O. L. 6. Wentw. 29.*

Signed by the party so devising the same.] *E. 33 C. 2. Lemain and Stanley.* The testator made his will, and wrote it with his own hand, and began it thus: I, *John Stanley*, make this my last will and testament; but did not subscribe his name; yet this was adjudged a good will, and sufficient signing by the testator within the statute, to pass lands; it being subscribed, by 3 witnesses, in the presence of the testator; for his name being written in the will, it must be a sufficient signing within the statute, since the statute hath not appropriated any particular place in the will, either top, bottom, or margin, for that purpose; and therefore necessarily the testator is at liberty to put it where he pleases. *3 Lev. 1.*

And it hath been said, that if the deviser only put his seal to the will, without signing it, this is a sufficient signing within the statute; because signing is no more than a mark to distinguish a man's act, and sealing is a sufficient mark to know it to be his will. *Gilb. 93.*

And in *Warneford and Warneford, E. 13 G.* On an issue directed out of chancery, *Raymond*, chief justice, ruled, that sealing a will is signing within the statute. *Str. 764.*

But in the case of *Smith and Evans*, in the exchequer; Dec. 6, 1751; it was said by the lord chief baron Parker, baron Clive, and baron Smythe, (baron Legge being absent) that what is said by North, Windham, and Charleton, in *3 Lev. 1.* that putting a seal to a will is sufficient signing within the statute, is very strange doctrine; for that if it were so, it would be very easy for one person to forge any man's will, by only forging the names of any two obscure persons dead; for he would have no occasion to forge the testator's hand. And the barons said, if the same thing should come in question again, they should not hold that sealing a will only was a sufficient signing within the statute. *1 Wilson, 313.*

And in the case of *Grayson and Atkinson*, July 17, 1752, in the chancery, lord Hardwicke said, that he should have much doubted upon that point; for the statute requiring the will to be signed, undoubtedly meant some evidence to arise from the hand-writing; then, how can it be said that putting a seal to it would be a sufficient signing? For any one may put a seal; no particular evidence arises from that seal; common seals are alike, and one man's may be like another's: no certainty or guard therefore arises from thence. And where an act of parliament mentions signing, it means something different from sealing. *2 Vezey, 459.*

H. 1728. Dormer and Thurland. The will was not signed by the testator in the presence of the witnesses; but he acknowledged it to be his hand, and declared it to be his will, in their presence; and they subscribed their names in his presence. Lord chancellor King inclined, that the will was good; but ordered the point to be reserved, and made a case of, for further consideration. *2 P. Will. 506.*

And in the case of *Stonehouse and Evelyn, E. 1734*, a will was held to be good, though all the witnesses did not see the testator sign it, but he owned it before them to be his hand. And the reporter says, that on his mentioning this case to Mr. justice Fortescue Aland, he said that

this was the common practice; and that it is sufficient, if one of the 3 subscribing witnesses swears that the testator acknowledged the signing to be his own hand-writing: And it is remarkable, that the statute of frauds doth not say the testator shall sign his will in the presence of 3 witnesses, but requires these three things; 1st, *that the will should be in writing*; 2dly, *that it should be signed by the testator*; and, 3dly, *that it should be subscribed by 3 witnesses, in the presence of the testator.* 3 P. Will. 254.

And in *Grayson and Atkinson*, July 17, 1752, by the lord chancellor Hardwicke: At the time of making the act, and ever since, if a bond or deed is executed by the person who signs it, afterwards the witnesses are called in, and before those witnesses he acknowledges that to be his hand: *that is always considered as an evidence of signing by the person executing*, and as an attestation of it by them. It is true, there is some difference between the case of a deed and a will in this respect, because signing is not necessary to a deed, but sealing is; and I do not know that it was ever held, that acknowledging his sealing without witnesses has been sufficient. But, notwithstanding, *that is the rule of evidence relating to signing*. If it was, in the case of a note, or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare signing; if that instrument is attested by witnesses, proving that they were called in, and that he took that instrument, and said, that was his hand, that would be a sufficient attestation of signing by him. That is the rule of evidence; and there is nothing in this act to take it out of the general rule. 2 Vezey, 457.

Attested and subscribed in the presence of the said devisor] It hath been ruled in equity, that a will of lands, attested by 3 witnesses, who subscribed their names at the request of the testator, though at several times, is a good will, though the witnesses were never once present together. Gilb. 92. Vin. Devise. N. 10, 12.

Feb. 1, 1742. *Jones and Lake*. A special verdict was found upon an ejectment; the case was, the testator signed and executed his will in December, 1735, in the presence of 2 witnesses, who attested the same in his presence; afterwards, in the year 1739, he, with his pen, went over his name, in the presence of a 3d witness, who subscribed his name in the testator's presence, and at his request. And the question was, whether this was a due execution within the statute. For the heir at law it was argued, that the statute requiring 3 witnesses to subscribe in the testator's presence, must intend they should be all present together; otherwise there is not that degree of evidence which the statute requires: for an attestation of 3 witnesses, at different times, has only the weight of one witness. *Witnesses to a will not only attest the due execution of the will, but likewise the capacity of the testator at the time of execution.* A man may be sane at the time 2 witnesses attest, and insane when the 3d attests. It cannot be considered as a will, till the 3d witness hath signed, for that completes the act. The will here is dated in 1735; suppose lands purchased after the date, and before the attestation by the 3d witness, will the lands pass? certainly not. On the other hand, it was argued for the devisee, that a will, executed before 3 witnesses, though at 3 different times,

times, is good; the statute not requiring they should all be present at the same time. The requisites under the statute are, that the testator should sign in the presence of 3 witnesses at least, and that they should attest in his presence. It would therefore be adding new requisites, which the act does not mention, and, in effect, be making a new law.

—By the lord chief justice Lee: This case depends upon the words of the statute. The requisites in the statute are, that 3 witnesses should attest his signing, but it doth not direct that the 3 witnesses should be all present at the same time. Here you have the oath of 3 attesting witnesses. This is the degree of evidence required by the statute. And the same credit is given to 3 persons at different times, as at the same time. We cannot carry the requisites farther than the statute directs. The act is silent as to this particular. It would therefore be making a new requisite. The signing is the same act reiterated. The testator went over his name again, and declared it to be his last will. And judgment was given against the heir at law. *2 Atkyns, 176.*

E. 31 G. 2. Carleton on the demise of Griffin v. Griffin. On a special verdict it was stated, that *John Griffin*, on the 2d of May, 1752, wrote upon a sheet of paper with his own hand, as follows: "Know all men by these presents, that I, *John Griffin*, make the after-mentioned my last will and testament;" and therein he made several dispositions of his real and personal estate; and subscribed it at the same time when he wrote it; but there was no seal or witness to it. And on the 5th of January, 1754, he wrote on the same sheet of paper, "Memorandum. Whereas I have laid out on a lighter [and so on]—all these, at my death, shall be at my wife's disposal: And this not to disannul any of the former part made by me on the 2d of May, 1752. Witness my hand, *John Griffin*." All this latter writing related only to the personal estate; and he subscribed it in the presence of 3 witnesses; and then he took the said sheet of paper in his hand, and declared it to be his last will and testament, in the presence of the said 3 witnesses; and then delivered it to them, and desired they would attest and subscribe it in his presence, and in the presence of each other; which they accordingly did. Upon this special case, one question reserved for the opinion of the court was, whether the republication of the said 1st will (made in 1752) upon the 5th of January, 1754, be a publication, or republication, of his 1st will, within the statute. It was argued, that this was no good will to pass lands, beyond all doubt, till the 5th of January, 1754; and what happened then, was neither a publication, nor a republication sufficient to make it a good will within the statute. Here are 2 distinct instruments, at 2 different times; the 1st unattested, relating to the real estate; the 2d, signed, published, and attested according to the statute, relating to the personal. But the 1st was originally bad, and could not be made good by the subsequent transaction.—By lord Mansfield and the court: The case is accurately stated; for it is not to be either a will, or a codicil, but a sheet of paper written. It is a will of an illiterate man, drawn by himself. At 1st, in 1752, the testator did not know that any witnesses were necessary. In 1754, he had found that they were necessary. Then he makes a subsequent disposition; which is a memorandum

randum to be added to it. But he doth not call this a codicil; nor doth the case state it to be so. He plainly considers the whole as one entire disposition; and he expressly declares in the latter, that he doth not thereby mean to disannul any part of his former devise or disposition. There is not a tittle in the latter that relates to the real estate; therefore the only intent of having the 3 witnesses, was, and must be, to authenticate the former. The signing the former does no harm; it makes it more solemn, but doth not hurt it. Then the publication of it is, as of a will. He takes up the sheet of paper; and holding up the said sheet of paper, says, it is my will. And certainly, he did not mean a part of it only, but the whole of it. And he desires them to attest it. All this must relate to the whole that was written on this paper. It must be considered as one entire will, made at different times, and attested agreeably to the statute. And a man is not obliged to make his whole will all at the same time. *Burrow, Mansf. 549.*

In the presence of the said devisor] E. 3 Ja. 2. Shires and Glascock. The question was, whether the will was made according to the statute; for the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them. By the court; the statute requireth attesting in his presence, to prevent obtruding another will in the place of the true one: it is enough if the testator *might see*; it is not necessary that he *should actually see* them signing; for, at that rate, if a man should but turn his back or look off, it would vitiate the will. Here the signing was in the view of the testator; *he might have seen it, and that is enough.* So, if the testator, being sick, should be in bed, and the curtain drawn. *2 Salk. 688.*

So, where a will was attested by witnesses in an attorney's office, when the testatrix was in her carriage, where she might see them through the windows thereof, and of the attorney's office, it was adjudged to be well attested. *Cassoon and Dade, H. 1781. Brown's, Cha. Rep. 99.* And the same principle is laid down in *Doug. 230.*

But if the witnesses subscribe their names to the will, in a room adjoining to that where the testator lay, but out of his sight, so as he could not see them subscribe their names; this is no good will within the statute to pass lands, because the witnesses in that case did not subscribe their names in the testator's presence. *Gilb. 93.*

But it is not necessary *that it appear upon the face of the will* to have been signed in the presence of the devisor: as in the case of *Hands and James, E. 9 G. 2.* In ejectment, brought by the plaintiff as heir at law, the question was, on a case, by consent, left to the opinion of the court, whether it shall be left to a jury to determine, whether the witnesses to a will (being all dead) did set their names in the presence of the testator, and this merely upon circumstances, without any positive proof. By the court: This is a matter fit to be left to the jury. The witnesses, by the statute, ought to set their names as witnesses, in the presence of the testator; but it is not required by the statute that this should be taken notice of in the subscription to the will; and whether inserted or not, it must be proved: if inserted, it doth not conclude, but the contrary may be proved; and if not conclusive, when inserted, the omission thereof

thereof shall not conclude that it was not so: and therefore it must be proved, by the best proof that the nature of the thing will admit of.

Comyn. 531.

And in the case of *Croft and Pawlet, E. 12 G. 2.* Upon a trial at bar, concerning the execution of a will, it did not appear upon the face of it, that the attestation of the witnesses was made in the presence of the testator; which being objected to, a case was cited, where lord chief justice Eyre held it a matter proper to be left to a jury, whether they believed it to be so done or not; And Mr. justice Chappel cited a case to the same purpose; to which the court assented; and they held it not to be necessary to be inserted in the will, that the attestation was in the presence of the testator, though, by the statute, it is necessary that it should, in fact, be so attested. *Vin. Devise. N. 9.*

By three or four credible witnesses] M. 1 W. Lea and Libb. The testator made his will in writing, subscribed by two witnesses, and therein devised his lands. Afterwards he made a codicil, in which his will was recited; and this also was attested by two witnesses, one of which witnesses was a witness to the will, but the other was a new witness. The question was, whether this new witness should make a third to the will: And it was adjudged that he should not. It is true, here are three witnesses to the intent and will of the testator; but there are only two to his will in writing: It is true, likewise, that there are two witnesses to the codicil; but those are not witnesses to the written will: so that there wants one witness to the will in writing. *3 Salk. 395.*

Credible witnesses] M. 34 Ch. 2. Hudson's case. Two witnesses swore, that the testator did not publish it as his will, but that another guided his hand, and that the testator made his mark, but said nothing, nor was he capable. On the other side it was proved, that the testator had made 2 former wills, and in them had devised his land, in the like manner as by this will, and that he died of a consumption, and was sensible to the last; and that 3 days after making his last will, he was sensible and able to discourse, and so continued till within 6 days of his death; hereupon it appeared, that the witnesses had been *dealt* with. To which the counsel on the other side urged, that if the witnesses were not to be believed, then there would not be 3 witnesses to the will, and so no will within the statute. To which Pemberton, chief justice, answered, that if there were 3 witnesses to a will, whereof one was a thief or person not credible, yet the words of the statute being satisfied, and he having collateral proof to fortify the will, he would direct a jury to find it a good will; and as to this case, he said it was not probable, that a person in his senses (as they are not able to disprove him to be) would suffer another to guide his hand to a writing and not say any thing; and that therefore they took it he did publish it: And he remembered *Diggles's* case, where the scrivener wrote the will, and 2 others were witnesses; the scrivener swore the testator was compos, and the 2 other swore he was not compos. The court stopped these 2 from going away till verdict was brought in, which found the will a good will, and then committed the 2 witnesses to the Fleet; for if this was suffered, it would be in any man's power to destroy another's will. So, likewise, did the court

court here commit the witnesses, and took security of the plaintiff to prosecute them for perjury. *Skin.* 79.

And in the case of *Alexander and Clayton*, *E. 8. G. 3.* where a woman had sworn against her own attestation, Mr. justice Yates said, she ought not to have been admitted to give this evidence. And lord Mansfield observed, that it is of terrible consequence that witnesses to wills should be tampered with to deny their own attestation. But, he said, that will not invalidate the will: for there are cases where one witness hath supported a will, by swearing that the other two attested, though those two have denied that they did so. *Bur. Mansf.* 2224.

In *1 L. Raym.* 85, it is said, that if the spiritual court refuse the evidence of the son to prove a will in which the father is a legatee, no prohibition is grantable. And before the delegates: There were 3 witness to prove a nuncupative will; 2 of them were without exception, and the 3d was son to the legatee. The statute of frauds requires 3 competent witnessess; the question therefore was, whether these 3 were sufficient, the son not being an evidence by the spiritual law; and adjudged, that they were; because 2 only were required by the spiritual law, and the 3d was a good witness within the intent of the act of frauds.

And although it was a general rule in the Roman law, that no one should be permitted to bear testimony in his own cause, yet legataries were allowed to give evidence upon this distinction, that they were particular, and not universal successors, and that a testament would be valid without legataries. The difficulty also, which must frequently have occurred, in obtaining so great a number of witnesses as seven, might probably induce the Romans to be less strict, as to the persons whom they admitted upon this occasion. But by the practice of the ecclesiastical courts of this kingdom, which have the sole cognizance of the validity of all wills, as far as they relate to personal estate, no legatee, who is a subscribed witness to the will, by which he is benefited, can be admitted to give his testimony, *in foro contradictorio*, as to the validity of the will, till either the value of his legacy hath been paid to him, or he hath renounced it; and in case of payment, the executor of the supposed will must release all title to any future claim upon such supposed legatee, who might otherwise be obliged to refund, if the will should be set aside; and a release, in this case, is always made, to the intent, that the legatee may have no shadow of interest at the time of making his deposition. The same practice also prevailed at common law, in regard to witnesses, who were benefited under wills disposing of real estate. And if a legatee, who was a witness to a will, had refused either to renounce his legacy, or to be paid a sum of money in lieu of it, he could not have been compelled by law to divest himself of his interest; and whilst his interest continued, his testimony was useless. And this was determined in the case of *Anstey and Dorsing*, *E. 19 G. 2.* which was thus: James Thompson, esquire, made his will, by which he disposed of his real estate, and gave to one John Hailes, and his wife, £ 10. each, for mourning, and an annuity of £ 20. to Elizabeth Hailes, the wife of John. This will of James Thompson was regularly attested, as the statute directs, by three witnesses

nesses, of which number the above-named John Hailes was one; and he refused to be paid £ 20. in lieu of his wife's legacy and his own. The cause was thrice argued at the bar, and the judges of the king's bench were unanimously of opinion, that *a right to devise lands is not a common law right*, but depends upon powers given by statutes; the particulars of which are, that a will of lands must be in writing, signed and attested by three credible witnesses, in the presence of the devisor: that these were checks to prevent men from being imposed upon; and certainly meant, that the witnesses to a will (who are required to be credible) should not be persons who are entitled to any benefit under that will; and that therefore John Hailes was not a good witness. (*Sir. 1254.*) But this very singular case, and the unanimous opinion of the judges upon the meaning and intent of the statute of frauds and perjuries, gave rise to the act of parliament here following. *Harr. Justin. B. 2, p. 49, 50.*

Which act is that of the 25 G. 2. c. 6. and runs thus: *Whereas some doubts have arisen on the act for prevention of frauds and perjuries, who shall be deemed legal witnesses within the intent of the said act; it is enacted, that if any person shall attest the execution of any will or codicil which shall be made after June 24, 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment, of, or affecting any real or personal estate, (other than, and except charges on lands, tenements, or hereditaments, for payment of any debt or debts) shall be thereby given or made; such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will or codicil.* § 1.

And in case, by any will, or codicil, any lands, tenements, or hereditaments, are or shall be charged with any debt or debts, and any creditor, whose debt is so charged, hath attested, or shall attest the execution of such will or codicil; every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act. § 2.

And if any person hath attested the execution of any will, or codicil, already made, or shall attest the execution of any will, or codicil, which shall be made on or before June 24, 1752, to whom any legacy or bequest is or shall be thereby given, whether charged upon lands, tenements, or hereditaments, or not; and such person, before he shall give his testimony concerning the execution of any such will or codicil, shall have been paid, or have accepted, or released, or shall have refused to accept such legacy or bequest, upon tender made thereof; such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest. § 3.

Provided, that in case of such tender and refusal as aforesaid, such person shall be in no wise entitled to such legacy or bequest, but shall be forever afterwards barred therefrom; and in case of such acceptance as aforesaid, such person shall retain, to his own use, the legacy or bequest which shall have been so paid, satisfied or accepted, notwithstanding such will or codicil

codicil shall afterwards be adjudged or determined to be void, for want of due execution, or for any other cause or defect whatsoever. § 4.

And in case any such legatee as aforesaid, who hath attested the execution of any will, or codicil, already made, or shall attest the execution of any will, or codicil, which shall be made on or before the said 24th day of June, 1752, shall have died in the life-time of the testator, or before he shall have received or released the legacy or bequest so given to him as aforesaid; and before he shall have refused to receive such legacy or bequest, on tender made thereof; such legatee shall be deemed a legal witness to the execution of such will, or codicil, within the intent of the said act, notwithstanding such legacy or bequest. § 5.

Provided always, that the credit of every such witness, so attesting the execution of any such will, or codicil, in any of the cases in this act before mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of; or of the court of equity, in which the testimony or attestation of any such witness shall be made use of; in like manner, to all intents and purposes, as the credit of witnesses in all other cases ought to be considered of and determined. § 6.

And no person, to whom any beneficial estate, interest, gift, or appointment, shall be given or made, which is hereby enacted to be null and void as aforesaid, or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand, or take possession of, or receive any profits, or benefit, of, or from, any such estate, interest, gift, or appointment, so given or made to him, in, or by any such will or codicil; or demand, receive, or accept any such legacy or bequest, or any satisfaction or compensation for the same, in any manner, or under any colour or pretence whatsoever. § 7.

Provided, that nothing herein shall extend to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested according to the said recited act, or any person claiming under them respectively, who has been in quiet possession for the space of 2 years next preceding the 6th day of May, 1751, as to such lands, tenements, and hereditaments, whereof he has been in quiet possession as aforesaid, nor to any will or codicil, the validity or due execution whereof hath been contested, in any suit in law or equity, commenced by the heir of such deviser, or the devisee in any such prior will or codicil, for recovering the lands, tenements, or hereditaments, mentioned to be devised in any will or codicil so contested, or any part thereof, or for obtaining any other judgment, or decree, relative thereto, on or before the 6th day of May, 1751, and which has been already determined in favour of such heir at law, or devisee in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same manner, to all intents and purposes as if this act had never been made. § 8.

Provided nevertheless, that no possession of any heir at law, or devisee in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with, or may be warranted by or under any will

will or codicil, attested according to the true intent and meaning of this act, or where the estate descended, or might have descended, to such heir at law, till a future or executory devise, by virtue of any will or codicil, attested according to this act, should or might take effect, shall be deemed to be a possession within the intent and meaning of the clause herein last before contained. § 9.

This act shall extend to such of the British colonies in America, where the said act, 29 C. 2. c. 3. is, by act of assembly, made, or, by usage, received as law; or where, by act of assembly or usage, the attestation and subscription of a witness, or witnesses, are made necessary to devises of lands or hereditaments; and shall have the same force, in the construction of, or for the avoiding of doubts upon, the said acts of assembly, and laws of the said colonies, as the same ought to have in the construction of, or for the avoiding doubts upon the said 29 C. 2. c. 3. § 10.

As to cases arising in any of the said colonies in America, no such devise or legacy as aforesaid, shall be made void by this act, unless the will or codicil whereby such devise or legacy be given, be made after the 1st of March, 1753. § 11.

Although it has never been determined judicially, whether this act is of force and operates with us, and that I had such great doubts upon it, notwithstanding the declaration in the 10th §, as not to insert it in the compilation of the public laws; yet, finding that there is a very great difference of opinion amongst the gentlemen of the bar concerning the same, I have inserted it here; for the satisfaction of those who consider it as of force, and to give those of adverse sentiments a further opportunity of canvassing the subject, and of bringing it, one day or other, to a legal decision.

Mr. Lining, the ordinary of the district of Charlestown, to whom I am extremely obliged for a great deal of useful information upon the several subjects contained in the official part of this book, assures me that there has been but one case where there could have been any contest: but that the witness to the will, renouncing the devise, and thereby removing the objection, was sworn and examined. This was in the case of Egan v. Egan, which was contested in July, 1786, and the decree given thereon in Jan. 1788.

An executor, who takes no beneficial interest, is a competent witness to prove the testator's sanity. *Doug.* 134.

If a person interested execute a surrender or release, he is an admissible witness, although the surrenderee, &c. should refuse to accept the surrender or release. *Id.*

It is no objection to an executor's testimony, that he may be liable to actions as executor de son tort. *Id.* 136.

The famous case of Wyndham and Chetwynd, which settled the law on this point, in England, is to be found in 1st Burrow, 414; afterwards, in 5 G. 3. the case of Hendson v. Hersey, was argued before lord c. j. Pratt (afterwards lord Camden) and the 3 puisne judges. His lordship differed from the opinion given by lord Mansfield in the case cited above, but the 3 other judges acquiesced in lord Mansfield's opinion, which confirmed the former decision, and settled the law in both courts. For l. c. j. Pratt's opinion, see 4 Burn's Ecclesi. Law, p. 86.

In the case of *Pendock and Mackender*, H. 28 G. 2. On a special case reserved at the assizes, the question was, whether one of the witnesses to the will was a sufficient witness within the statute, who, before the time of attestation, had been indicted, tried, and convicted for stealing a sheep, and was found guilty to the value of 10d. and had judgment of whipping. After 3 arguments at the bar, the whole court of common pleas were clearly of opinion, that he was not a competent witness; and laid it down as a rule, that it is the crime that creates the infamy, and takes away a man's competency, and not the punishment for it; and it is absurd and ridiculous to say it is the punishment that creates the infamy. The pillory has been always looked upon as infamous, and to take away a man's competency as a witness. But to shew the absurdity of this notion; suppose a man is convicted on the statute against deer-stealing, there is a penalty of £ 30. to be levied by distress, and if he has no distress, he is to be put in the pillory: so that if the pillory be infamous, the person convicted (according to this nation) will be so if he has not £ 30. but if he has £ 30. he will not be infamous. Petit larceny is felony. And there is no case where a person convicted thereof was ever admitted to be a witness. 2 Wils. 18.

2. A written will of goods and chattels is not altered as to this matter by the said statute, but continues as it was before.

If any will, in writing, shall contain devises of real estate, and also legacies of goods and chattels, and such will cannot be proved so as to pass the real estate, the same shall not, for that cause, be void, as to the bequests of the goods and chattels. No. 1582, § 7, p. 491, Pub. Acts.

If it be certain and undoubted, that the testament is written or subscribed with the testator's own hand, in this case the testimony of witnesses is not necessary; but if it be doubtful whether the testament were written, or subscribed, by the testator, in this case the testimony of witnesses is necessary, to confirm the same to be the testator's own hand. Swin. 353.

And although witnesses to prove the will may be necessary, yet it doth not seem to be of absolute necessity that the names of these witnesses should be by them subscribed to the will.

In the case of *Limbery against Mason and Hyde*, T. 8 G. 2. several cases were cited wherein these strict formalities were determined not to be requisite: as in the case of *Wright and Walthoe*, H. 1710. There were 3 testamentary schedules, whereof 1 was without date; the 2d was written *In witness*, but there was no witness; the 3d concluded abruptly: yet being written by the testator, they were declared to be his will. Comyn. 452.

So in the case of *Worlick and Pollet*, 1711. Before the delegates. The testatrix sent for a person to make her will; gave him instructions for the same; when he had wrote it, he read it to her; she approved it; declared it to be her last will; sent for 3 witnesses to see her execute it; Signed and sealed was written, but she died before any other execution: yet it was held a good will. For though the first sentence for it was reversed upon appeal, yet it was afterwards affirmed by the delegates. Comyn. 452.

And by Gilbert, chief baron: If a will be made of goods, and writ-
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in the party's own hand, without any witness at all; it is allowed to be good, and the statute doth not require any witnesses to chattels only. *Gill. Rep.* 260.

And even supposing a man's will, beginning, I Thomas Overburg, but not in his (T. O.) hand-writing, and to which there is no subscribing witness; if it can be proved that such will was written by T. O.'s directions, it shall be deemed and held a valid testament. *2 Black. Com.* 501.

In the case of *Brown and Heath*, 1721. A will of a real and personal estate was prepared in order to be executed, though there were several blanks in it, and the testator died before execution; yet it was held a good will for the personal estate: and though more was intended to be done, yet it shall be good for what is done. *Comyn.* 453.

So in the case of *Loveday and Claridge*, 1730. The testator intending to make his will, pulled a paper out of his pocket, wrote down some things with ink, some with a pencil, and though it had no conclusion, but appeared to be a draught which he intended after to finish, for it was not signed, but had at the end a calculation of his effects, an account of his tea table, and an order to pay a dividend of stocks; yet it was held to be a will. *Comyn.* 452.

So in the case where the testator gave instructions to make his will of his real and personal estate; and when it was brought to him, he made several alterations, and then wrote the whole over as altered with his own hand; this being found in his study, though not signed or sealed, was held a good will (as to the personal estate). It is true, the 1st sentence was, that he died intestate; but that was reversed by the delegates. *Comyn.* 453.

But it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses. *Black. Com.* 2 vol. 501.

3. By the same statute of the 29 C. 2. c. 3. § 7. *All declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is, by law, enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of none effect.* No. 331, p. 83, Pub. Acts.

And all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same by such last will or devise; or else shall be utterly void and of none effect. § 9. Id.

4. A nuncupative testament is, when the testator without, any writing, doth declare his will, before a sufficient number of witnesses. *Swin.* 58.

By the aforesaid statute, 29 C. 2. c. 3. § 19. *No nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of £30. that is not proved by the oaths of 3 witnesses at the least, that were present at the making thereof; nor unless it be proved, that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his habitation or dwelling, or where he hath been resident for the space of 10 days or more before the making of such will, except where such person*
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was surprized or taken sick, being from his own home, and died before he returned to the place of his dwelling. No. 331, p. 84, Pub. Acts.

But this clause has been altered by the 4th § of No. 1582. For no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of £ 10. sterling, that is not proved by the oaths of 3 witnesses at least, who were present at the making thereof, and bid by the testator to bear witness that such was his will, or words to that effect; nor unless such will was made in the last sickness of the deceased, in the house or place where he or she shall die. P. 491, Pub. Acts.

And after 6 months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within 6 days after the making of the said will. § 20. 29 C. 2. c. 3. No. 331, p. 84, Pub. Acts; and § 5, No. 1582, p. 491, Pub. Acts.

And then 12 months shall be allowed, and no more, for the probate of such will. No. 1582, § 5. p. 491, Pub. Acts.

And no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till 14 days at the least after the decease of the testator be fully expired. 29 C. 2. c. 3. § 21. No. 331, p. 84, Pub. Acts. Nor shall any nuncupative will be, at any time, received to be proved, unless process have first issued to call in the widow or next of kindred to the deceased, to the end they may contest the same if they please. § 21. 29 C. 2. c. 3. No. 331, p. 84, Pub. Acts; and § 5, No. 1582, p. 491, Pub. Acts.

Provided, that, notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he might have done before the making of this act. § 23. 29 C. 2. c. 3. No. 331, p. 84, Pub. Acts; and § 6, No. 1582, p. 491, Pub. Acts.

And by the 4 An. c. 16. All such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereunto. § 14, No. 331, p. 95, Pub. Acts.

All witnesses which are good witnesses at trials at common law, shall be good witnesses to prove a nuncupative or verbal will, made of goods and chattels, agreeable to the aforementioned statute (of C. 2.) for preventing frauds and perjuries. No. 597, § 3, p. 139, Pub. Acts.

By the oaths of 3 witnesses at the least] T. 1704. Philips and the parish of St. Clement Danes. Dr. Shallmer, by will in writing, gave £ 200. to the parish of St. Clement Danes; and after, Prew the reader coming to pray with him, his wife put him in mind to give £ 200. more towards the charges of building their church; at which, though Dr. Shallmer was at first disturbed, yet afterwards he said he would give it; and bid Prew take notice of it; and the next day bid Prew remember of what he had said to him the day before, and dies that day. Within 3 or 4 days after, the doctor's widow put down a memorandum in writing of the said last devise, and so did her maid. Prew died about a month after; and amongst his papers was found a memorandum of his own writing, dated 3 weeks after the doctor's death, of what the doctor said to him about the £ 200. and purporting that he had put it

it in writing the same day it was spoken; but that writing, which was mentioned to be made the same day it was spoken, did not appear; and these memorandums did not expressly agree. About a year after, on application of the parish to the commissioners of charitable uses, and producing these memorandums and proofs by Mrs. Shallmer and her maid, they decreed the £ 200. But on exception taken by the executor's, the decree was discharged of this £ 200. and the lord chancellor held it not good, because it was not proved by the oath of 3 witnesses: for though Mrs. Shallmer and her maid had made proof, yet Prew was dead, and the statute in that branch requires not only 3 to be present, but that the proof shall be by the oath of 3 witnesses. 1 *Abr. Cas. Eq.* 404.

Testator being about to alter his will, and leave his nephew £ 100. his executor, being present, tells him he need not alter his will, for he would pay his nephew the £ 100. which, after the testator's death, he refuses to do: the lord chancellor declared this a fraud upon testator, and decreed payment of the £ 100. the legacy being proved by 3 persons. 1 *Wilson*, 227.

[*Letters testamentary or probate of any nuncupative will*] *H. 22 & 23 C. 2. Verhorn and Brewin.* An administrator brought a bill to discover and have an account of the intestate's estate: the defendant pleaded, that the supposed intestate made a nuncupative will, and another person executor, to whom he was accountable, and not to the plaintiff as administrator. But decreed, that though there was such a nuncupative will, yet it was not pleadable against an administrator before it was proved. 1 *Chan. Cas.* 192.

Hence we may perceive, that this will extends only to personal estate: that the testamentary words by which it is to be made, must be spoken with an *intent* to bequeath, not any loose idle words in the sick person's illness; for he must require the by-standers to bear witness of such his intention: that it must be made at home, or among his family or friends, unless by unavoidable accident, to prevent impositions from strangers; and it must be in his last sickness; for, if he recovers, he may alter his disposition, and has time to make a written will: that it must not be proved after 6 months from the making, unless it were put in writing within 6 days from that time; nor yet too hastily, as not until 14 days after the testator's death, nor till legal notice hath been given to his widow or next of kin. *Black. Com. 2 vol.* 501. And that the probate of such will shall not be admitted after 12 months.

The legislature having thus provided against any frauds in setting up nuncupative wills, by such a numerous train of requisites, that the thing itself is fallen into disuse, and hardly ever heard of but in the only instance where favour ought to be shewn to it, when the testator is surprized by sudden and violent sickness. *Id.*

5. A codicil, by intendment of law, is either to alter, explain, add, or subtract something from the will; and wherever it is added to a testament, and the testator declares that it shall be in force, in such case, if the will happens to be void for want of those solemnities required by law, yet it shall be good as a codicil, and be observed by the administrator: it is true, executors cannot regularly be appointed in a codicil,

cil, but yet they may be substituted according to the will of the testator, and the codicil is still good. *Swin.* 14.

M. 31 C. 2. Stoniwell's case. The testator made his wife executrix and residuary legatee; but she dying in his life-time, he, by a codicil nuncupative, devised to G R all which, by will, he had given to his wife, and died. The question was, whether this nuncupative codicil was good, notwithstanding the statute before mentioned; and adjudged that it was, and as it were a new will for so much as he had given to his wife, and that it did not alter his written will, for there was no such will, the operation of it being determined by the death of the wife, living the testator, who was her husband. *Raym.* 334.

Lord Mansfield decreed, 20 Nov. 1723, that a testator, signing and publishing his codicil, (wherein he says, I ratify and confirm my will) in the presence of three witnesses, was a republication of his will, and both together made but one will. *Acherley and Vernon. Comyns. Rep.* 382. See also the case of *Doe v. Davy. Cowp.* 158. and *Doug.* 690, 691. Note. And *Heylyn v. Heylyn. Cowp.* 130.

If an executor be named in the first testament, and none in the second will, then the first testament shall stand, and the latter shall be added only by way of codicil. *Swin.*

Although no man can die with 2 testaments, because the latter doth always infringe the former; yet a man may die with divers codicils, and the latter doth not hinder the former, so long as they be not contrary. *Swin.* 15.

If 2 testaments be found, and it doth not appear which was the former or latter, both testaments are void: but if two codicils be found, and it cannot be known which was first or last, and one and the same thing is given to one person in one codicil, and to another person in another codicil, the codicils are not void, but the persons therein named ought to divide the thing betwixt them. *Swin.* 15.

If codicils are regularly executed and attested, they may be proved as wills are. So if they are found written by the testator himself, they ought to be taken as part of the will, and to be proved (in common form) by the oath of the administrator with the will annexed; and in case of opposition, by witnesses to the hand-writing and finding: and it hath been usual to exhibit an affidavit of the hand-writing and finding, before a probate or administration passes even in common form. 4 *Burn.* 98.

But here codicils are proved in the court of ordinary, exactly in the same manner as wills are with us: not by common form as in England, but by the attestation of some of the witnesses. If there are none, (as is sometime the case with regard to personal estates) or the witnesses should be dead or absent, then it is proved, not by the executor's oath, as in England, but by a disinterested person, even in cases not contested.

But in the case of a real estate, a codicil cannot operate, unless it be executed according to the statute. 1 *Atk.* 426.

It is necessary, therefore, when a codicil is added to a will, with intent to pass any real estate, to be careful in using words sufficient, whether it be for altering former dispositions, or disposing of estates purchased after the will was made; and for the testator to execute the
codicil

codicil in the same manner, and with the same number of witnesses, as is requisite to the executing an original will according to the statute. So, if a will concerns only personal estate, and a codicil is added, with intent to make any alteration, substruction, or addition, care ought to be taken to use words sufficient for the purpose.

But it is much more adviseable, where there is time and opportunity, to write over the will afresh, and thereby make the necessary alterations, than to do it by codicil, which, perhaps, may require as much, if not more, nicety in framing, than the will itself. *Lovelass*, 168.

But a witness to the execution of a codicil should have no legacy given him thereby; for, by the statute 25 Geo. 2. c. 6. all legacies given to witnesses are declared void.

If a person make a will, and then a codicil thereto, and afterwards revoke such will, and make another, the codicil to the first will shall stand as good, notwithstanding the revocation of the first will.

6. *Donatio causa mortis*, or a gift in prospect of death, is where a man, moved with the consideration of his mortality, doth give and deliver * something to another, to be his in case the giver die, but if he lives he is to have it again. *Law of Test.* 179. *Prec. Cha.* 269.

In every such gift there must be a delivery made by the party in his last sickness; and nothing can operate as such, without having been delivered in the testator's life-time, by him or his order. 3 *P. Will.* 357.

A man, by his will, disposed of personal estate, and afterwards by parol, gave £ 100. bill to one to deliver over to his nephew, if the testator should die of that sickness; and this gift was held good. *Drury and Smith.* 1 *P. Will.* 404.

So, where the husband, upon his death-bed, delivered to his wife a purse of 100 guineas, bidding her apply it to no other use than her own. *Lawson and Lawson.* 1 *P. Will.* 441.

So, where the husband, upon his death-bed, drew a bill on his goldsmith, to pay his wife £ 100. for mourning. *Ibid.*

March 11, 1744; *Baily and Snelgrove.* Mrs. *Baily*, going out of town in a bad state of health, gave her maid a bond executed to her by a 3d person; saying, if I die, it is your's. She died intestate. The administrator brought a bill to have the bond delivered up. But by the lord chancellor Hardwicke: This is a sufficient *donatio causa mortis* to pass the equitable interest of this bond upon the intestate's death. The question in this case was, whether the nature of the property was capable of being so given: His lordship held it might, as well as a specific chattel; though no legal property passed thereby, nothing but the paper, a bond being evidence of a debt, and the intent being to give the debt, not the paper; he held it a good donation *mortis causa*, comparing it to the property which passes by assignment of a bond, which passes nothing in point of law, and the assignee must make use of the other's name for recovering on it. He put the case, that if a chattel in possession had been bought by the intestate, and a bill of sale made to a trustee for her use; the property would have been in the trustee, and the equitable interest in the *cestui qui trust*, who, if she had given

*. This SOMETHING must be personal goods. *Black. Com.* vol. ii. 514.

given this chattel so circumstanced to the defendant, it would have been good. 3 *Atk.* 214. 2 *Vez.* 432.

But in the case of *Ward and Turner*, July 20, 1752, it was held by lord Hardwicke, that a delivery of receipts for South sea annuities was not sufficient, (though there was strong evidence of the intent;) and that it could not be done without a transfer, or something amounting to that; and all the anxious provisions of the statute of frauds will signify nothing, if donation of stock, attended only by delivery of the paper, is allowed. It might be supported to the extent of any given value, and would leave these things under the greatest degree of uncertainty, and amount to a repeal of that useful law as to all this part of the property of the subjects of this kingdom. Therefore, notwithstanding the strong evidence of the intent, this gift of annuities is not sufficiently made within the rules of the authorities. And considering how much of the personal estate of this kingdom is now vested in stocks and funds, his lordship said he was of opinion not to carry it further. 2 *Vezey*, 431.

In the case of *Smith and Casen*, 8 Dec. 1718, the master of the rolls, where jewels were given by the testator, by way of donatio causa mortis, doubted whether this was good against debts. And it seems not; they being given in case of the donor's death, and in nature of a legacy, which, therefore, would be fraudulent, as against creditors. 1 *P. Will.* 106.

T. 13 G. Thompson and Batty. An executor libelled in the spiritual court, for taking a tankard without his consent, on pretence that the testator gave it to the defendant, if he died of his then sickness. And the court granted a prohibition; this not being a legacy, but a donation in prospect of death, the validity whereof may be tried in an action of trover. *Str.* 777.

For this is a matter of which the common law takes notice, and need not be proved in the ecclesiastical court. 1 *P. Will.* 441. *Sel. Cas. in Chan.* 14.

7. If the testator shew the will unto the witnesses, saying, this is my last will and testament, or, herein is contained my last will; this is sufficient without making the witnesses privy to the contents thereof, provided the witnesses be able to prove the identity of the writing; that is to say, that the writing now shewed is the very same writing which the testator in his life-time affirmed before them to be his will, or to contain his last will and testament. *Swin.* 52. *God. O. L.* 66.

And it is not necessary that the witnesses should be acquainted with the contents of the will. *Ellis and Smith.* 5 *Bac. Abr.* 505. *Lovelass,* 153.

Whether it is necessary, that the testator should declare to the witnesses, at the time of the attestation, that the writing which they attest is his will, hath been matter of some doubt. As in the case of *Wallis and Wallis*, *T.* 1762. Thomas Wallis, esquire, made his will, and therein devised his real estate to his wife for life; the will was of his own hand-writing; and the form of attestation was in these words, *signed, sealed, published, and declared, for the last will and testament of the said Thomas Wallis, in the presence of us, &c. Isabella Matthews,*

James

James Wardell, William Powell. The heir at law brought an ejectment. The widow pleaded the devise to her for life. The cause came on to be heard at the summer assizes at Lincoln, 1762, by a special jury, before Mr. justice Denison. To prove the execution of the will, the defendant produced William Powell, the testator's coachman, one of the 3 subscribing witnesses, who deposed, that in the beginning of July, 1760, James Wardell, then butler to the said Thomas Wallis, came and told him, the said Powell, that he was to come to his master; that upon entering the room, he found his master sitting with a table before him, on which were some papers open; and that his master called him, and the said Wardell, and one Isabella Matthews, then his house-keeper, up to the table to him, where they all came. Then the said Thomas Wallis, further addressing himself to them all, desired them to take notice; and then took a pen, and, in all their presence, signed and sealed each part of his will, and laid both the said parts open and unfolded before them to subscribe their names as witnesses thereto; which they all did, by the direction of the said Thomas Wallis, in his presence, and in the presence of each other; he shewing them severally where to write their names. But that the said Thomas Wallis, otherwise than as above, did not declare or publish either part to be his will, or say what it was. The counsel for the plaintiff contended, that this was not a sufficient proof by one witness, of a complete execution of the will. And they produced, on the other hand, the other two subscribing witnesses; who, in divers particulars, did not give a clear and distinct evidence; and could not recollect whether they had signed 1 or 2 papers; or whether then, or at any time before the said Thomas Wallis's death, they understood what they had so witnessed to be the said Thomas Wallis's will, though Wardell seemed to admit he conjectured it so to be. But both Wardell and Matthews swore that they did not see the said Thomas Wallis sign or seal either part of his said will; that Powell, the other subscribing witness, was not at that time in the room, when (at the said Thomas Wallis's desire) they wrote their names to the two papers as they now appear; that the said Thomas Wallis did not declare or publish it as his will, nor did they know it to be a will. The defendant's counsel then called Richard Price, the said Thomas Wallis's groom, who swore, that one morning in the beginning of July, 1760, James Wardell told him that his master had much wanted him; and that upon his the said Price's offering to go to his master, to receive his orders, the said Wardell told Price that the business was done, and that Powell had supplied his place; and that he the said William Powell, James Wardell, and Isabella Matthews, had that morning been witnessing their master's will. And Sarah Dixon, being called, swore, that, in the beginning of July, 1760, Isabella Matthews came one morning after breakfast into the kitchen, and told her that she the said Matthews, James Wardell, and William Powell, had that morning witnessed their master's, the said Thomas Wallis's will, though he had not told them it was so. Upon this state of the evidence on both sides, it was insisted for the plaintiff, that, as the law stood before the statute of frauds, *publication* of a will was an essential part thereof; and if so, there is nothing in that statute to take it away. And further it

was insisted, that by the said statute there are 4 requisites to constitute a good and valid devise of lands: 1. That it shall be in writing. 2. That it shall be signed by the party devising, or by some other person in his presence, and by his express directions. 3. That it shall be attested and subscribed, in the presence of the devisor, by 3 or 4 credible witnesses. 4. That the words *attested and subscribed* must import, that it shall be published as a devise or will by the testator, in the presence of the said witnesses. On the contrary, for the defendant it was insisted, that neither before nor since the statute, publication was necessary; and that by the statute, only the 3 first requisites are necessary, which, in the present case, were all complied with, the devise being in writing, and signed by the testator in the presence of 3 credible witnesses, who had subscribed their names, as witnesses to the same, in the presence of the testator, and of each other: and further, supposing any such publication was necessary, that the testator had used words and done acts which amounted to a publication within the meaning of the statute, which had not directed or prescribed any particular form or manner in which such publication should be made; that the testator using these significant words to all the witnesses, when he called them up to the table, "*take notice,*" and then signing both parts of his will, and then delivering both the parts thereof to the witnesses to attest, directing them where to sign their names, and to witness each part under the common and usual form of attestation, which the witnesses did, was a sufficient execution and publication of his will; that the words "*signed, sealed, published, and declared,*" being all written in the testator's own handwriting, and the witness, Powell, swearing that both the parts of the will lay open to the inspection of all the witnesses when they subscribed their names; and it appearing, by the evidence of Price and Dixon, that both the other witnesses had declared that they had been attesting the said Thomas Wallis's will, this was much stronger than the case of *Peate and Ugley*, reported in *Comyns*, 197. And Mr. Justice Denison was of opinion, if the witnesses for the defendant were credited by the jury, that this was a due execution within the statute, and a sufficient publication: and for this cited the case of *Trimmer and Jackson*, lately determined in the court of king's bench. And the jury found accordingly a verdict for Mrs. Wallis the defendant. Nevertheless, the plaintiff's counsel insisted, that the point, whether a good publication or not, should be reserved for a case to be argued above. But the matter was compromised, on the defendant's remitting the costs.

Note. The case of *Peate and Ugley* was, where the testator produced to the witnesses a paper folded up; and desired them to set their hands to it as witnesses, which they all did in his presence; but they did not see any of the writing, nor did he tell them it was his will, or say what it was; but it was all written by the testator's own hand. It was objected, that this was not a good execution of the will within the statute; for it is not sufficient that the witnesses write their names in the presence of the testator, without any thing more; but they must attest every thing; to wit, the signing of the testator, or at least the publication of his will. But here the testator neither signed the will in their presence, nor declared it to be his last will before them. On the other part

part it was insisted, that the execution was sufficient within the statute; for there is no necessity that the witnesses see the testator write his name; and if he writes these words, *signed, sealed, and published* as his will, and prays the witnesses to subscribe their names to that, it will be a sufficient publication of his will, though the witnesses do not hear him declare it to be his will. And Trever, chief justice, inclined, that here was sufficient evidence of the execution, and the jury found it accordingly. But as to the matter of law, he permitted it to be found special. And it doth not appear further what became of it.

The case of *Trimmer and Jackson* was where the witnesses were deceived by the testator at the time of the execution, and were led to believe, from the words used by the testator at the execution of the instrument, that it was a deed and not a will. It was delivered as his act and deed; and the words "*sealed and delivered*" were put above the place where the witnesses were to subscribe their names. And it was adjudged by the court, *as it is said*, for the inconveniences that might arise in families, from having it known that a person had made his will, that this was a sufficient execution.

8. The clause of *perfect mind and memory* is more usual than necessary in a will; and yet not hurtful. *Swin. 77.*

But in case of a contestation, it is necessary to prove the sanity of the testator. *2 Atk. 56.*

CHAP. IV. *How Guardians and Executors shall be appointed; and whether Executors are entitled to Overplus.*

1. *WHERE any person shall have any child or children under the age of 21 years, and not married, at the time of his death, it shall be lawful for the father of such child or children, whether born at the time of the decease of such father, or at that time in ventre sa mere, or whether such father be within the age of 21 years, or of full age, by his deed executed in his life-time, or by his last will and testament, in writing, in the presence of 2 or more credible witnesses, in such manner, and from time to time, as he shall think fit, to dispose of the custody and tuition of such child or children, during such time as he or they shall respectively remain under the age of 21 years,* to any person or persons, in possession or remainder, other than popish recusants: and such person, to whom the custody of such child shall be so disposed or devised, may maintain an action of ravishment of ward, or trespass, against any person who shall wrongfully take away or detain any such child, for the recovery of such child, and recover damages for the same in the said action, for the use and benefit of such child. § 1, No. 788, p. 217, Pub. Acts.*

And such person, to whom the custody of such child shall be so disposed or devised, may take into his custody, to the use of such child, the profits of all lands, tenements, and hereditaments of such child; and also the custody, direction,† and management of the goods, chattels, and personal estate of such

* The 12th C. 2. c. 24. from which this act is nearly copied, has the additional words, "or any lesser time."

† The same statute uses the word "tuition" instead of "direction."

such child, till his or her age of 21 years; or any lesser time, according to such disposition aforesaid; and may bring such actions in relation thereto, as, by law, a guardian in common socage might do. § 2, *id.*

Of the several species of guardians, the first are guardians *by nature*; namely, the father, and (in some cases) the mother of the child. For if an estate be left to an infant, the father is, by common law, the guardian, and must account to his child for the profits. And with regard to daughters, it seems, by construction of the statute of 4 and 5 *Ph. and M. c. 8. p. 60, Pub. Laws*, that the father might, by deed or will, assign a guardian to any woman-child under the age of 16; and if none be so assigned, the mother shall, in this case, be guardian. There are also guardians *for nurture*; which are, of course, the father or mother, till the infant attains the age of 14 years: and in default of father or mother, the ordinary usually assigns some discreet person, to take care of the infant's personal estate, and to provide for his maintenance and education. Next are guardians *in socage*, who are also called guardians *by the common law*. These take place only when the minor is entitled to some estate in lands; and then, by the common law, the guardianship devolves upon his next of kin, to whom the inheritance cannot descend. These also, like guardians for nurture, continue only till the minor is 14 years of age; for then, in both cases, he is presumed to have discretion, so far as to chuse his own guardian. 1 *Black. 461.*

By the common law, the age of chusing guardians, both as to the male and female, is the age of 14. 1 *Inst. 78.* And this is, in default of the father's appointing one. *Lovell, 158.*

Heretofore, there was also a guardian *in chivalry*; which was introduced among the Gothic nations, to breed them to arms; but is now fallen with the tenures; for by the 12 *C. 2. c. 24*, all tenures by knight's service and in capite, are taken away, and turned into free and common socage. 1 *Inst. 74, 87, 88, and 5 §, No. 331, p. 99, Pub. Acts.*

Guardians, appointed by the spiritual court, are only for the personal estate; guardians for the real estate were heretofore under the direction of the court of wards and liveries; which court being taken away by this statute, power is given by the same statute to the father, by his deed or will, to appoint guardians; which, if he shall not do, or if the guardians appointed by him shall die or refuse to act, then that power devolveth upon the court of chancery, the chancellors being the supreme guardian of all infants and others not capable to act for themselves. 4 *Burn. 103.*

But if the spiritual court appoint a guardian to an infant who has a real estate, such appointment is void. 2 *Lev. 162, 217.*

In the case of *Buck and Drafer*, March 26, 1747, a petition was preferred to the lord chancellor Hardwicke, by the mother of the infant, to discharge an order of the master of the rolls appointing the plaintiff guardian of her daughter; upon an allegation of his unfitness, as being disordered in his mind, and that she the mother had long before been appointed guardian of her daughter by the ecclesiastical court at York, and had, by virtue of that appointment, taken possession of the infant's person and estate.—The lord chancellor dismissed the petition with costs, the facts of the lunacy being not at all made out; and said,

said, he was surprized upon what pretence the ecclesiastical courts in the country take upon them to appoint guardians *ex officio*, without any suit instituted for that purpose; and by this means break in upon the jurisdiction of this court with respect to the guardianship of infants; and said, he recommended it to the attorney-general to consider, whether a *quo warranto* might not issue to the ecclesiastical court, upon such an extra-judicial appointment of guardians to infants, where no suit at all is depending for this purpose. 3 *Atk.* 631.

A guardian may be appointed by chancery, though no suit is depending. 3 *Atk.* 813.

If a feme-infant, who is in ward, marries, at common law the guardianship is determined, because the husband, immediately on the marriage, becomes her guardian; and it would be inconsistent that she should at the same time be under the power of another guardian. 2 *Inst.* 260.

The court never appoints a guardian to a woman after marriage. 1 *Vez.* 157.

It shall be lawful for the father] By the common law, before this act, it was not lawful for the father to appoint a guardian either in chivalry or socage; but the law appointed one for him: and in such case, the guardian appointed by the law could not refuse; but the guardian appointed by the father; under the statute; may refuse, if he pleaseth. *Vaugh.* 182.

For the father] Therefore the act only authorized the father, and not the mother; although she hath the same concern for her heir as the father. And as the father only can appoint a guardian, so therefore the guardian appointed by him cannot appoint another guardian: for it is a personal trust; and not assignable, any more than guardianship in socage. *Vaugh.* 179.

In the case *ex parte Edwards*, June 18, 1747, the mother, by her will, appointed a guardian to her son till his age of 21. An application was now made to the court for maintenance, and in case they should not approve of the guardian appointed by the mother, that a new one may be assigned. By lord Hardwicke: the statute confines the power of appointing a testamentary guardian to the father only; and therefore the appointment by the mother is absolutely void. And the infant being of the age of 14, chose a guardian in court. 3 *Atk.* 519.

In ventre sa mère] A tutor may be assigned to a child that is not born. *A. A. No.* 788, § 1, p. 217, *Pub. Acts.* But this act gives no power to the father to appoint a guardian to his child; being an idiot or a lunatic, after he shall be of the age of 21 years.

Whether such father be within the age of 21 years, or of full age] Therefore the father, under the age of 21, may grant the custody of his heir; but he cannot demise or devise his land in trust for him directly: but he may do it obliquely; for, by appointing the custody, the land follows as an incident given by the law to attend it. *Vaugh.* 178.

By his deed executed in his life-time, or by his last will] In the case of the earl of Shaftesbury and Hannam, where the father had given the guardianship of the infant to one by deed, and to the mother by will, it was decreed, that the will was a revocation of the deed. *Cha. Ca. Finch* 323.

By

By his last will] And such will need not to be proved in the spiritual court. 1 *Ventr.* 207. That is to say, if the will is merely upon this act for the appointing a guardian and nothing else; for in such case, the appointment being solely by act of assembly, the temporal courts shall be judges thereof. But in the same will, if there is any disposition of the personality (as is most commonly the case), it seemeth that the will shall be proved in the court of ordinary for the whole: which probate shall be effectual so far as the personality is concerned, although it shall be of no avail with respect to such particular appointment of a guardian by the act.

In such manner, and from time to time, as he shall think fit] It seemeth not to be material by what words the tutor is appointed, so that the testator's meaning do appear. Wherefore, if the testator say, I commit my children to the power of such a one; or, I leave them in his hands; it is, in effect, as if the testator had said, I make him tutor to my children. So it is, if he say, I leave them to his government, regimen, administration, or the like. For, in all things, the will and meaning of the testator is to be observed, and preferred before the propriety of the words, whereof, perhaps, he is ignorant; which meaning is to be collected by that which went before or followeth in the will, and by other circumstances, which the judge ought to enquire. *Swin.* 216.

Under the age of 21 years, "or any lesser time"]* And if the infant marries in the mean time, this shall not dissolve the guardianship. 3 *Atk.* 625.

Or any lesser time]* If a man deviseth the custody of his heir apparent, and no time is mentioned, yet it is a good devise of the custody within the act, if the heir be under 14 at the death of the father: because, by the devise, the guardianship is changed only as to the person, and left the same as to the time. But if the heir be above 14, then the devise is void for the uncertainty; for the act did not intend every heir should be in custody till 21, but only so long as the father shall appoint, not exceeding that time. *Vaugh.* 184.

To any person or persons in possession or remainder, other than popish recusants] Yet there are other exceptions: for † persons denying the trinity, or asserting that there are more gods than one, or denying the christian religion to be true, or the holy scriptures to be of divine authority, shall, for the second offence, be disabled to be guardians. § 1, *No.* 202, p. 4, *Pub. Acts.*

In general, he that cannot be an executor, cannot be a guardian. *Swin.* 211.

But trustees, named in a will, may also be appointed guardians by the father. *Lovell.* 158.

May maintain an action of ravishment of ward] The ecclesiastical court cannot intermeddle with the body, although the parents make no disposition thereof. 3 *Keb.* 834.

But,

* Notwithstanding these words are omitted in the A. A. 1748, I have thought proper to insert the readings on them, as the deficiency may be supplied by the legislature hereafter.

† Copied from 9 and 10 W. 3. c. 32.

But, by the express words of this act, the guardian by will takes place of all other guardians; and the guardian under this statute may have ravishment of ward, as the guardian by knight's service or in socage at common law might have had. 3 *Keb.* 528. 2 *P. Will.* 115.

May take into his custody, to the use of such child] This guardian being made after the model of a socage guardian, and coming in the place of the father, hath not a bare authority, but an interest; but it is only an interest joined with his trust (as being necessary in order to the performance of the trust,) but not an interest for himself. *Vaugh.* 181, 183. 2 *P. Will.* 122.

The profits of all lands] A guardian by nurture, being so appointed by the testator's will, can only lease at will, and not for any number of years; for the guardian himself (except he be guardian in socage) is only tenant at will. *Cro. Eliz.* 678, 734. 8 *Mod.* 312.

In the case of *Roe* on the demise of *Parry* against *Hodgson*, *T.* 33 *G.* 2. Upon a case stated for the opinion of the court of common pleas, the principal question was, whether a lease for 21 years, made by the testamentary guardians of an infant, Mr. Spencer, was absolutely void or only voidable. It appeared, that Mr. Spencer himself has done no one act since he came of age, either towards establishing the lease (supposing it voidable) or to avoid it. Upon the first argument, the court agreed in one point, viz. that a testamentary guardian, by statute, till an infant was 21 years of age, and a guardian in socage, till an infant was 14, were the same; and therefore, whatever interest the latter had in lands till the infant was 14, the guardian by statute has the same until he is 21. As to the main question, whether the lease was void or only voidable, they doubted much, and took further time to consider. And at last they resolved unanimously, that a guardian of an infant cannot make a lease of the infant's lands, and that the lease in this case was absolutely void. 2 *Wilson*, 129, 135.

Of all lands, tenements, and hereditaments of such child] It seemeth, that this guardian shall have the custody, not only of lands descended, or left by the father, but of all lands and goods any way acquired or purchased by the infant (which the guardian in socage had not;) which proves that he derives not his interest from the father, but from the law; for the father could never give him power or interest of or in that which was never his. 2 *P. Will.* 185.

When any real estate is intended for an infant, it is usual to devise it to some person or persons in trust for him till he attain 21 years of age, with directions to the trustees how to manage the same in the interim. *Lovelass*, 158. For the law will not trust an infant with any real estate. *Id.*

And also the custody, direction, and management of the goods] Swinburne says, the office of a tutor is, to provide that his pupil be honestly and virtuously brought up; and to provide for him meat, drink, cloaths, lodging, and other necessities, according to the child's estate, condition, and ability. *Swin.* 217.

And the same also doth further consist, in the good and faithful administering or disposing of the goods and chattels of the said pupil; that is to say, the tutor may not commit any thing that may be hurtful, nor omit any thing that may be profitable to his pupil, and in the end must restore

restore unto his pupil all his goods and chattels, by him the said tutor before received. And for that purpose every tutor ought, even at the very entry into his office, to make a true inventory of all the goods and chattels of his pupil, and to make a just and true account of his dealings in behalf of his pupil. *Swin. 217.*

The tutor may sell such goods belonging to the pupil, as cannot be kept until he come to lawful age. But other goods which may conveniently be kept, and especially goods immoveable, the tutor may not sell, unless otherwise ordered by will. *Swin. 217.*

More particularly; the guardian ought to apply the estate in his hands, to pay the *debts* of the infant. *1 Cha. Ca. 157.*

He may pay off the *interest* of any real incumbrance, and the *principal* of a *mortgage*; because it is an immediate charge on the land; but no other real incumbrance. *Prec. Cha. 137.*

In the case of *Waters and Ebral, H. 1707*, where the mother, as guardian, received the rents of the estate, and paid off specialities, but took assignment, and after the death of the infant brought a bill against the heir for a discovery of assets by descent (she claiming the rents received as administratrix;) it was held by the court, that the guardian is not compellable to apply the profits of the estate of the infant, to pay off the *bond* debts of the ancestor. *2 Vern. 606.*

In the case of the earl of *Winchelsea and Norcliff, T. 1686*. A guardian, having a considerable sum of money in his hands, laid it out in a *purchase* of lands, for the benefit of the infant, if, when he came of age, he should agree to it; the infant dying in his minority, it was decreed that the guardian should account for the money to the administrator of the infant; for that he could not, without the direction of the court, convert the personal into real estate. *1 Vern. 403, 435.*

M. 35 C. 2. Osborn and Chapman. A guardian, at the request of one who was going to marry the ward, gave in an account of the estate to the intended husband, and secured to him the balance by 3 several bonds; and the intended husband gave a bond to the guardian, to release all accounts to him after the marriage: the marriage was had: the guardian paid the balance; but the husband gave no release, but sued for an account, and relief against the bond. And the guardian was ordered to answer the bill: for the account was made when the intended husband had no title; no release was given; and the *pur-suit* is fresh. *2 Cha. Ca. 157.*

For, by Cowper, lord chancellor, wherever a father, mother, or guardian insists upon private gain, or security for it, and obtains it of the intended husband, it shall be set aside. *1 Salk. 158. 2 Vern. 652.*

For marriage brokerage agreements have been often condemned in equity. And a bond to give money if such a marriage could be obtained, is ill. And so is a bond to forgive a sum of money. For such bonds, although good at law, yet being introductive of infinite mischief, have, upon great consideration, been condemned in equity. *3 P. Will. 394.*

But a guardian, upon account, shall have allowance of all reasonable costs and expences in all things. *Litt. § 123.*

And if he receive the rents and profits, and be robbed without his default or negligence, he shall be discharged thereof. *1 Inst. 89.*

By

By the statute of the 4 *An. c.* 16. § 27. Actions of account may be brought against the executors or administrators of guardians. *No.* 331, *p.* 97, *Pub. Acts.*

By the 6 *An. c.* 18. § 5. Any person, who, as guardian or trustee for any infant, shall hold over, after the determination of the particular estate, without consent of the person next entitled, shall be adjudged a trespasser, and shall pay damages to the value of the profits received. *Appendix, No.* 1, *p.* 19, *Pub. Acts.*

By the 7 *An. c.* 19. Infants seised or possessed of lands in trust, or by way of mortgage, shall and may, on direction of a court of equity, signified by an order made on hearing all parties, on petition of the person for whom such infant shall be seised in trust, or the mortgagor, or guardian of such infant, convey and assure the said lands, as such court shall direct. *No.* 331, *p.* 97, *Pub. Acts.*

Guardians and trustees who have the care, management, or custody of the estates, real or personal, of any infants or minors, shall be obliged, once at least in every 3 years, and so from time to time, to render, upon oath, true and perfect inventories and accompts of all monies, goods, chattels, and effects, which they shall, from time to time, receive, during the minority of such infant, into the secretary's office. § 6, *No.* 748, *p.* 202, *Pub. Acts.*

And may bring such actions in relation thereto, as, by law, a guardian in common socage might do] And he may also submit matters to arbitration; for though the infant cannot submit to an award, yet the guardian may do it for him, and bind himself that the infant shall perform it. *Comb.* 318.

An infant may sue either by his guardian or next friend; but must defend by his guardian. *Cro. Ja.* 641.

An infant cannot be sued but under the protection, and joining the name of his guardian, he being to defend him against all attacks, as well by law as otherwise; and when the infant comes of age, he must give him an account of all that he hath transacted on his behalf, and answer for all losses occasioned by his wilful delay or negligence: and it frequently happens, that an infant institutes a suit in equity, against a fraudulent guardian, by his *prochein-ami*; whom the court will check and punish, if he has abused his trust; and sometimes proceed to the removal of him, and appoint another in his stead. *Lovelass*, 158.

And if an infant refuseth to name a guardian to appear by, the plaintiff, by order of court, may do it for him. *Str.* 1076.

Where the defendant is an infant, the plaintiff ought to apply to him to name his guardian; and if he does not name him in 6 days, the plaintiff must apply to the court to oblige him so to do. 2 *Wils.* 50.

If an infant sue by guardian, the plaintiff's attorney must give notice of the guardian's place of abode. 1 *Wils.* 246.

And the *prochein-ami*, or next friend, need not to be a relation; but he must be a person of substance, because liable to costs. 1 *Atk.* 570.

And when an infant brings an action by his guardian, the warrant for him to appear by guardian, ought to be entered upon record, because it is the act of the court; for the court takes care of infants, that none

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shall

shall sue for them, but those that are responsible; for if the infant be prejudiced, he may have this action against him. *L. Raym.* 232.

But the suit is not in the name of the guardian, but of the infant; for, at this day, a guardian doth not act in any cause for a minor in his own name, as guardian; but the minor acts in his own name by his guardian. 1 *Ought.* 337, 359.

Every guardian, or trustee, is entitled to £2. 10s. for every £ 100. he shall receive, and the sum of £2. 10s. for every £ 100. which he shall pay away, during the course of his management; and so in proportion for less than £ 100.: but no guardian or trustee shall, for his trouble in lending out and receiving the monies so lent out, be entitled to more than 20s. for every £ 10. for all sums arising by monies lent to interest, so to be by them received, and in like proportion for a larger or a lesser sum: and no guardian, or trustee, who is a creditor of any testator or intestate, or to whom is let or bequeathed any sum of money or other estate, or effects, shall be entitled to any reward, or commissions, for the paying, or retaining to themselves, any such debts or legacies. § 11, No. 748, *Pub. Acts.* But omitted by accident, in that collection, as the clause of the act 1789, only re-enacts that part of this § which relates to executors and administrators.

Guardians and trustees, who have had extraordinary trouble in the management of the estates under their care, and shall not be satisfied with the sums herein mentioned, may bring their action in the common pleas, for their services; and the verdict of the jury, and judgment of the court thereupon, shall be final and conclusive: but no verdict shall be given for more than 5 per cent. over and above the sums allowed by this act. § 12, No. 748, *p.* 203, *Pub. Acts.*

The commissions given by this act shall be divided amongst guardians and trustees, according to the proportion of the services by them respectively performed, to be settled by the chief justice, and two of the justices of the common pleas, in case they cannot agree amongst themselves. § 13, *Id.*

2. * Persons denying the trinity, or asserting that there are more Gods than one, or denying the christian religion to be true, or the holy scriptures to be of divine authority, shall, for the second offence, be disabled to be executors. No. 202, *p.* 4, *Pub. Acts.*

An infant may be made executor, how young soever he be. *Swin.* 331.

And if the infant executor be so young, that he hath no discretion, (for it is not only lawful to make such an one executor, but also the child in the mother's womb, and unborn at the death of the testator;) in that case the ordinary, or other to whom the approbation of the testament appertaineth, after the birth of the child, doth commit the execution of the will to the tutor of the child, for the child's behoof, until he be able to execute the same himself; which tutor hath authority to deal as executor, until the child be able to undertake the executorship; that is to say, until he be of the age of 17 years. During which minority the administrator to the child's use cannot sell or alienate any of the goods of the deceased, unless it be upon necessity; as for the payment of the deceased's debts, or that the goods would otherwise perish; nor let a lease

lease for a longer term than whilst the executor shall be in minority; because, having that office for the good and benefit of the child only, he may not do any thing to his prejudice. *Swin.* 359, 360.

And after his age of 17 years, before he shall come to the age of 21, an act done by such infant, as executor, as (for instance) the releasing of a debt due to the testator, or the selling or distributing of the testator's goods, is said to be sufficient in law: which is to be understood, upon true payment and satisfaction of the due to the deceased, made to the executor in minority; for then he may acquit and discharge the debtor for so much as he doth receive; for therein he doth perform the office and duty of an executor, which he is enabled to do, and so doing, his act shall bind him. But if he shall release without satisfaction, this act is not according to the office and duty of an executor; and, therefore, being without the compass of his office and duty, shall not bind or bar him from recovery thereof: for if it should, then should it be a *devastavit*, and charge the minor out of his own proper goods; which cannot be by law: for an infant may better his estate, but not make it worse, by contracting with, or acquitting of another person. *Swin.* 358, 359. 2 *Bac. Abr.* 377.

M. 1730. *Jones* and the earl of *Strafford*. In the case where an administration is granted, during the minority of an infant executrix, being under the age of 17 years, and she marries a husband of age, King, lord chancellor, and Raymond, chief justice, strongly inclined against the opinion reported by lord Coke, in *Prince's* case; that such administration, during the minority of the executrix, is determined: the same being extra-judicial in that case, and not taken notice of by other cotemporary reporters; and the author of the book, entitled *The Office of Executors*, mentioning this opinion, a little marvels thereat, considering (as he observes) that these things are managed in the spiritual court, and by the canon law, which intermeddles not with the husband in the wife's case; and that by that law, and not by the common law, comes in this limitation of 17 years; and he adds, that he hath seen that case otherwise reported in this point. 3 *P. Will.* 88.

If administration is granted during the minority of divers executors, he that comes first of age shall prove the will, and the administration ceases. *Law of Test.* 416. And if there be 2 executors, 1 of the age of 17, and the other under, he that is of full age may solely prove the will. 1 *Lev.* 181. And therefore, administration during the minority of him that is under age is void. *Brownl.* 46.

Swinburne says, if a wife, during the coverture, be named executrix, she alone cannot sue for any debt due to the testator, without her husband. But (he says) she alone may do an act extra-judicial, as the paying of debts, or legacies, or the receiving, or releasing of any debts due to the testator. *Swin.* 417.

And the husband and wife, being but one person in law, she cannot be executrix without his assent; for if she might, then he would be executor against his will; therefore, if she is made executrix, she cannot bring an action alone, but her husband must join with her; and if he should refuse, he cannot be compelled, nor can she be compelled to plead without her husband. *Swin.* 417, 418.

But

But (he says) although she cannot sue or be sued without him, yet, she may deliver any of the testator's goods to another to keep; and may pay legacies, and receive debts, and give acquittances, without her husband; and if any *devastavit* is made by giving acquittances, it shall bind them both, because she could not administer without his assent; and it shall be accounted his folly to suffer such a person to administer. *Swin.* 418.

But it seemeth that this must be understood only according to the spiritual law, which, in this case, maketh no difference betwixt married and sole; for otherwise it is by the common law.

For, by the common law, the assent to a legacy, by a feme-covert executrix, is not good, unless her husband assent to it also; otherwise it is void: but the assent to such legacy by her husband is good. *Law of Ex.* 264. 2 *Bac. Abr.* 378.

And the release of a feme-covert executrix is not good; for she can do nothing to the prejudice of her husband: but, without question, the release of the husband is good. *Curson*, 53. 1 *Roll's Abr.* 924.

And this, not only during the marriage, but also after the death of the husband. But if the wife die, the husband cannot convert any of the goods and chattels belonging to the first testator, to his own proper use; for of such goods the wife herself may make a testament, (Swinburne says) appointing an executor, without the licence of her husband. *Swin.* 417.

If a man is possessed of a term for years, in right of his wife, as executrix of her former husband, he has power to grant and convey the same. 3 *Wils.* 299.

And if the husband commits waste, and then she dies, there is no remedy at common law against her husband, but only in the spiritual court, where he will be compelled to make restitution. 1 *Roll's Abr.* 919.

In the case of *Taylor and Allen*, Oct. 29, 1741. The testator made the defendant, Allen, who was a feme-covert, his executrix, the husband being then in England; but at the death of the testator, the defendant's husband was in the West-Indies. It was moved for an injunction to restrain the defendant from getting in the assets of her testator, and for a receiver to be appointed. By lord Hardwicke: There are several instances where this court hath interposed, to prevent an executor from getting assets of a testator into his hands, upon particular circumstances; and this is one of those cases, for the husband being in the West-Indies, and not amenable to the process of this court, the plaintiff can have no remedy, if the executrix should waste the assets, or refuse to pay, because the husband must be joined in the action. And a receiver was appointed, to collect in the assets, and to bring actions in the name of the executrix, for recovery of debts due to the testator; on giving security to indemnify the executrix and her husband, on account of such actions brought. 2 *Atk.* 213.

But the greatest part of this doctrine respecting feme-coverts, is of no avail in this country, since the wisdom and liberality of our legislature have ENACTED, *That, in case any feme-covert have any right or claim to any lands or tenements within this province, OR ANY OTHER ACTION*

OR SUIT WHATSOEVER, such feme-covert shall have power to constitute an attorney, under her hand and seal, to prosecute such her claim, action, or suit, either in her own name, or in the name of her husband and self, as if her husband had joined with her in such power of attorney; and such person so constituted shall have power to prosecute such suit or claim to effect; and her husband shall not have power to abate, discontinue, or release her claim or action, without her voluntary consent, given in open court, and recorded in the proceedings: neither shall such suit or action be any way abated, upon the account of such woman being under coverture; but the proceedings shall be, in all things, as good, and effectual in law, as if such woman was sole, or her husband joined with her in such suit; any law, statute, act, usage or custom, in this province, to the contrary notwithstanding. § 16, No. 332, p. 104, Pub. Acts.

Although an executor becomes a *bankrupt*, yet administration cannot be committed to another; but if an executor become *non compos*, the spiritual court may commit administration. 2 *Bac. Abr.* 376.

And in the court of chancery, forasmuch as an executor is considered only as a trustee; if he be insolvent, that court will oblige him, as they will any other trustee, to give security, before he enters upon the trust. 2 *Bac. Abr.* 377.

In general, all persons are capable of being executors that are capable of making wills. *Lovelass*, 155.

If a person shall, by will, appoint his debtor to be his executor, such appointment shall not, in law or equity, be construed to be a release or extinguishment of the debt, unless the testator shall, in his will, expressly declare his intention to release the same. No. 1582, § 25, p. 494, *Pub. Acts*.

And attention ought to be had to the making a creditor an executor, it being an established rule, that a legacy given by a debtor to his creditor, which is equal or greater than the debt, shall be presumed to be intended in satisfaction of the debt; yet this rule, although acknowledged to be fully established, being thought a strict rule, in some late cases a dissatisfaction has been expressed with respect to the principle upon which it proceeds, and the court has been anxious to collect, from the will, circumstances to rebut the presumption; and where the payment of debts hath been particularly mentioned in the will, the presumption of the testator's intention, that the legacy given should be in satisfaction of the debt, hath been taken away, and the creditor decreed both debt and legacy. 1 *P. Will.* 410. 3 *Atk.* 65. So where the legacy hath not been equally beneficial with the debt in some particular, (although it may have been more so in another,) as in time of payment, or in point of certainty. 1 *P. Will.* 410. Note 1. 4 edit.

As to the *form and manner* of making an executor in the will, it is not always necessary to express this word *executor*, neither hath every testator skill so to do; but it is sufficient, if the testator's meaning do appear by other words of like sense or import: as if the testator say, I commit all my goods to the disposition of *AB*; or, I leave all my goods, or the residue of all my goods, to *AB*; or the like; for in these cases, he to whom all the residue is bequeathed, is thereby understood to be made executor. *Swin.* 247.

3. The question how far the executor shall be entitled to the *surplus*, although he be *not* by the express words of the will appointed *residuary legatee*, hath been long litigated, and received a diversity of determinations.

Formerly it was a settled notion, that where there was no residuary legatee appointed by the will, the surplus or residuum devolved to the executor's own use, by virtue of the executorship. But now there is this restriction, that although where the executor has no legacy at all, the residuum shall, in general, be his own; yet, wherever there is a sufficiency on the face of a will (by means of a competent legacy or otherwise) to imply that the testator intended his executor should not have the residue, the undevise surplus of the estate shall go to the next of kin; the executor then standing upon exactly the same footing as an administrator, who, by 22 & 23 C. 2. c. 10. must make * distribution thereof to the intestate's next of kin. *Black. Com. vol. 2. p. 514.*

And for making this distribution it may be observed, that an executor is compellable thereto by the court of chancery. 2 *Vern.* 362.

It has been determined lately, that if there be no kindred, the executor shall stand trustee for the crown, to whom the undevise surplus shall go, as in the case of a person having no kindred, dying wholly intestate. *Middleton & Spicer, H. 1782, Bro. Cha. Rep. 201.*

Where any monies or personal estate shall be found in the hands of an executor or administrator, being the property of any person heretofore deceased, or hereafter dying, and leaving no person entitled to claim according to the statute of distribution, and without making disposition of the same, the escheator of the district where such chattels shall be found, or the attorney-general, on behalf of the state, shall sue for and recover, at law or equity, and pay the same into the treasury of this state; and the treasurers shall advertise the same, in the State Gazette, once in every month for 6 months; and if no person shall make good title to such personal estate within 2 years thereafter, other than as executor or administrator, or their legal representatives, then such personal estate shall become vested in and applied to the use of this state. No. 1490, § 8, *Pub. Laws, p. 430.*

Nothing herein contained shall prejudice the rights of individuals having legal title, and who may be under the disabilities of infancy, coverture, lunacy, or beyond the limits of the United States, until 3 years after such disabilities shall be removed. *Id.* § 9.

In the case of *Foster and Munt, M. 1687.* The testator devised particular legacies to his children and grand-children, and £ 10. apiece to his executors for their care; the surplus of the personal estate being £ 5000. and upwards. The question was, whether the surplus should be a trust for the children, or go to the executors. And it was decreed a trust for the children. For as the legacy to the executors was given for their care, unless such care was to turn to the benefit of others, and not of themselves, the will would be absurd; and therefore it necessarily followed, that the testator designed them only to be trustees for the next of kin. 1 *Vern.* 473. 2 *Vern.* 648. And although no such declaration

* The method of distribution has been lately altered in this state, for which see chap. 12 of distribution of intestates effects.

claration had been made, yet the legacy being given generally, the law made the same construction, and it was for their care; it being impossible to imagine, that the testator would give a general legacy, if he intended the executor should take the whole. 2 *Abr. Eq. Cas.* 443.

H. 1697. Earl of Bristol and Hungerford. The testator devised lands to be sold for payment of his debts, and ordered that the surplus should be deemed part of his personal estate, and go to his executors, and gave to his executors £100. apiece as a legacy. The question was, whether the executors should have the surplus to their own use, or should distribute according to the statute of distribution. For the executors it was insisted, that the surplus should be part of his personal estate, and go to them, and that he meant it to their own use; and his giving them a legacy of £100. apiece cannot alter the case, for the surplus perhaps might be nothing; and therefore he gave them the £100. that they might at all events be sure of something, and not to exclude them the benefit of the surplus: and this being a devise of the surplus, after debts and legacies paid, cannot be a trust in them, for then all their trust is performed, when debts and legacies are paid. On the other side it was said, that the words in the will, that the surplus should be part of his personal estate, and go to his executors, were only intended to exclude the heir, who else would have had it, and not to give any greater interest to his executors than they would have had otherwise. And of that opinion was the lord chancellor, who decreed that they were trustees of the surplus for the next of kin. 1 *Abr. Cas. Eq.* 244.

But in the case of *Griffiths and Rogers, T. 1704*, where a man devised his library of books to one, except 10 books, such as his wife should chuse, and made her executrix; it was decreed, that she should not by this devise be excluded from the benefit of the surplus of the personal estate. 1 *Abr. Cas. Eq.* 245.

In the year 1725, in order to settle this point, the lord chancellor King, brought a bill into the house of peers, which passed that house, but was thrown out by the commons. The bill was to have settled it for the benefit of the executor. *Str.* 569.

July 15, 1740. *Newstead and Johnston. Grace Lawson*, by her will, gave several legacies to her children, and then directs £1000. to be taken out of her partnership stock in trade, and settled in strict settlement on her son; the residue of her partnership stock she gave to a trustee, with very particular directions as to the management, in trust for the separate use of her daughter, *Elizabeth Johnston*, who was a feme-covert, and appoints *Elizabeth Johnston* her executrix, but makes no disposition of the surplus. The bill was brought for an account of this surplus, and that the executrix might be a trustee of the same for the next of kin to the testatrix.—By the lord chancellor *Hardwicke*: The cases in regard to excluding executors from taking the surplus of the personal estate, by reason of the particular legacies before given to them, have been very various, and undergone different determinations, according to the different circumstances and opinions, and way of reasoning of different persons concerning them; and it is absolutely impossible to reduce all those cases to any certain general rule, without

out some contrariety between them. But I think the present case a very plain one, that the executrix here should not be excluded from the surplus.—*The law is clear, that where a man makes his will, and an executor, it is a gift in law of all his personal estate to him.* So is the rule of the ecclesiastical court. Therefore it is, that where a suit is brought in such case for a distribution of the residuum undisposed of by the will, this court will prohibit them from proceeding in such suit; because they are bound to give the residuum to the executor. And this court interposes upon a supposed trust in the executor, of which that court has no cognizance. And I remember some cases, one at the latter end of queen Anne's time, and another since, and another when I sate as chief justice on the king's bench, where such prohibitions have gone. So that the ground upon which executors have been in any cases compelled to distribute the surplus, has been, upon certain circumstances in equity, which have induced a violent presumption, amounting to evidence, that the executor was intended only a trustee.—The 1st case was *Foster and Munt*; where it was sent to the master to enquire what the surplus amounted to. And I have heard, that arose in a great measure from an ill opinion the lord chancellor *Jefferies* had of the executor's behaviour in obtaining that will. And it being reported to amount to £ 5000. he thought it was absurd to say the testator would have given the executor so small a legacy as £ 10. for his care and pains, if he had meant at the same time to give him the surplus. But there was no particular evidence of any fraud in the case, but only such a general charge in the bill. So that the decree was founded wholly on that single point.—From that time, *it was taken, where a legacy was given to an executor for his care and trouble, without any disposition of the surplus, that he should be considered as a trustee.* And that was founded upon good reason: for such a legacy, for care and pains, was a plain declaration of the testator's intention, that, as to the rest, the executor should not take it to his own use; for it were ridiculous to suppose, that the testator should give him a small legacy for his trouble in managing an estate for himself.—Afterwards the court went further in the like kind of reasoning, and held, *that, where a particular legacy was given to the executor generally, without saying for care and pains, even this would exclude him from the surplus;* because of the absurdity, (as no doubt there would be) in giving him some, and giving him all. From whence the court raised an implication, that since the testator had given him a part, he never intended him the whole. *And this point is now established;* though it was at first objected, that the particular legacy might be owing to a doubt of the testator, that the whole personal estate might not prove more than sufficient to pay all the legacies; in which case the executor could have nothing. For which reason, the testator might be unwilling to leave him to the chance of the surplus, but would secure something to him by a particular legacy, and then, in case of a deficiency, he would abate only in proportion. However, this point has been now long established, and is not to be controverted by such an argument. And I remember, in the case of *Farrington and Keely*, lord *Macclesfield* said, that he had consulted Mr. *Vernon*, who had then left the bar, who told him

him that he did not then trouble himself with taking notes of modern resolutions upon this point; because he looked upon it to be as plain and settled, as that an estate to a man in fee should descend to a man and his heirs.—Other cases have been determined *in favour of the next of kin*, upon the circumstances of the proximity of blood: *But these determinations have been over-ruled in later cases*; because that reasoning might produce great uncertainty. For if that distinction were to be admitted, then a distinction would arise as to those of a nearer degree of kindred, and those who are more remote; and if the testator's estate was to depend on such circumstances, it would bear a very uncertain construction; though, in the case of *Ball and Smith*, there was a distinction in favour of a wife.—I mention these things to lay them out of the case: For the ground of my determination is, that the legacy is given to a feme-covert of stock in trade, in trust for her separate use; and under very particular circumstances. The intent of the testatrix is manifest. She gives the particular legacy in trust for the wife, who was her daughter; because otherwise it would have passed to the husband as his absolute property; for though, upon her death, it would have passed from her to the administrator *de bonis non*, yet the husband would have it in point of property and interest, as he would be entitled to it after the debts and legacies were paid out of the assets: which reason does not extend to the residuum; for that it does not appear but she intended the husband should have that as well as her daughter; and no implication can arise upon a will but by a necessary construction; if so, the testatrix had no occasion to make an express devise of that, in trust, as she did of the other.—It was said in the argument of this cause, that a particular legacy, given in trust for an executor, will have the same effect in point of law, and bar him of the residuum, as much as if the legal interest of the legacy were given him. And that is certainly true; because it implies nothing which makes any difference between such a devise in trust, and an absolute one. But, as I said before, here was a particular reason why this legacy was expressly given in trust, for the husband could not have been otherwise excluded; and it is, that the trustee may enter into partnership with the son, and he is to improve the stock for the separate use and benefit of the wife; which prevents the common implication, that the residuum should not pass. Therefore I think there is no ground in this case to make the executrix account for the surplus; and as to that, the bill must be dismissed.

June 9, 1745; *Southcot and Watson*. General *Pulteney*, by his will, gives, in the first part of it, to Mrs. *Watson*, an annuity of £400. and in the last clause gives her all his household goods and furniture, (three pictures excepted) and all his plate, linen, watches, jewels, and cloathes whatsoever, and declared her sole executrix. The bill was brought for an account of such part of the personal estate as is undisposed of, and for a distribution. And by the lord chancellor *Hardwicke*: The bequest of the specific things to Mrs. *Watson* excludes her from the residue. 3 *Atk.* 226.

But a devise of the residuum is not a devise over of a particular legacy. 1 *Wils.* 137.

Oct. 24, 1750; *Blinkhorn and Feast*. The testator gave a pecuniary
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legacy to *A*, and another of a different value to *B*, both infants, and made them his executors. The question was, as to the residue of his personal estate, whether it should result to the next of kin, or go to his executors. By the lord chancellor *Hardwicke*: Though the law casts the whole personal estate upon the executor; yet, as a will is to be construed chiefly according to the intention of the testator, if it appear manifestly his design that the executor shall not have it, it shall be distributed by this court. *As where a specific legacy is given to an executor, he shall not have the residue*; as it would be absurd to think, that the testator, after he had given him what he thought convenient, should also intend to give him the whole residue, which would include the particular legacy. Yet, in many cases this construction may be improper; and therefore, the rule of law has been suffered to take place. As in the case of *Griffith and Rogers*, where the executrix had a specific legacy of ten books. And in the case of *Jones and Westcomb*, (Prec. Ch. 316.) where a man, possessed of a long term, devised it to his wife for life, and after her death to the child she was then ensient with, and made her executrix. For, in this case it was necessary to devise the term to her specifically, for the sake of the limitation to the child. In the present case, not to mention that it is improbable the testator would have made these persons, who are infants, his executors, merely for the purpose of distributing his personal estate, without any benefit to themselves: it was very proper he should give them these legacies, though he might intend they should after have the residue; for they do not take the legacies as they will the residue; for this they are entitled to jointly and equally, and the survivor will take the whole. But the legacies are unequal in value, and their interest in them different and separate. And it cannot be inferred, that the residue includes the particular legacies; for, as they are bequeathed, the legatees are entitled to them in severalty, and with different interests: whereas, if he had not separated them, they would have devolved jointly, and otherwise than he intended they should. And he decreed the residue to the executors.

Finally; in the case of *Lawson and Lawson*, April 19, 1777, upon an appeal from the chancery to the house of lords, it was determined, that, unless in cases where the contrary is inconsistent and incompatible with the apparent intention of the testator, or there is violent presumption of fraud, the residue of the personal estate, after payment of debts and legacies, shall go to the executor.

Where unequal legacies have been given to executors, and the surplus or residuum of the testator's estate undisposed of, the same hath been adjudged to devolve to the executors, by virtue of their executorship, upon this principle, "*that there appeared not a sufficiency, on the face of the will, to imply that the testator's intention was otherwise.*" And upon this principle the case of *Bowker and Hunter* was determined in favour of the executors. *Frances Bayley* being possessed of a considerable personal estate, 31st Jan. 1777, made her will, and thereby gave to *T. V. Hunter* the sum of £200.; and, after a great many legacies to a variety of persons, among whom were some of her next of kin, she gave the Rev. *J. Eaton* the sum of £50.; and then made the said *Hun-*

and *Eaton* her executors, but made no disposition of the residue. The executors having proved the will, the next of kin filed a bill in the court of chancery, for an account of the residue of the testatrix's estate, and prayed that it might be distributed, as the executors had legacies left to them. The defendants (executors) admitted assets more than sufficient to pay debts, legacies, and funeral expences; but insisted they had a right to the personal estate, there being nothing inconsistent with such right in the will, or indicative of a contrary intention; the legacies not being given to them as executors, but by their proper names, and there being a great inequality between them, by which the testatrix shewed she meant to dispose of the whole, and not to die intestate as to any part thereof. The lord chancellor, in his discussion of this question, said, "Here the testator's intention is declared in more slender words than in any of the other cases. When the testator gives the executor part by express words, and in the same manner as he appoints him executor, it shews his intention to be different from that expressed by the fact of making him executor. In order to make a gift of part a bar to taking the residue, the general gift must make the intent as clear as the other intention is from making him executor: where it will bear another intent, it will not bar him from taking the residue. The fundamental distinction is established by laying it down, that the rule, "*that the executor shall take the residue,*" must prevail, unless there is an irresistible inference to the contrary. If the gift of the legacy is qualified, it is sufficient to prevent its barring the residue, or if it may be given for a different purpose. The gift of unequal legacies may have a different ground from the gift of the whole; it may, in many events, be different: for instance, if £ 100. be given to one, and £ 50. to the other, it may be different, in case of deficiency, from giving the one £ 50. the other nothing. The implication is, that the testatrix must have had a different intent, and that must rebut the equity; and therefore the bill must be dismissed." 1783, *Bro. Cha. Rep.* 328. And this decree was affirmed upon a rehearing of this cause before the lords commissioners.

Upon the whole that hath been mentioned in regard to executors taking the residue, we may observe, that, *by law, the appointment of an executor vests in him all the personal estate of the testator not otherwise disposed of*; but, wherever courts of equity have seen, on the face of the will, sufficient to convince them that the testator did not intend the executor to take the surplus, they have turned the executors into trustees for those on whom the law would cast the surplus, in case of a complete intestacy, *i. e.* the next of kin; as where the executors are expressly called executors in trust, or where any other expression occurs shewing the *office only* to be intended them, and not the *beneficial interest*. And a *pecuniary* legacy, given to a *sole* executor, affords sufficient argument to exclude him from the residue; and so *equal pecuniary* legacies to *two or more*, shall exclude them. But, wherever the legacy is *consistent* with the intent that the executor should take the whole, a court of equity will not disturb his legal right. And a legacy to *one only*, or *two or more* executors, shall exclude neither from the surplus; because the testator might intend to such one a *preference*:
the

the same rule and reason holds, where *several* executors have *unequal pecuniary* legacies; as in the case of *Bowker* and *Hunter* above recited. *Lovell*, 184, 185.

Although courts of law and equity are very cautious in admitting parol evidence upon the construction of wills, yet, in favour of executors, where the next of kin claimed the undivided surplus, it has been received: and the ground of its admissibility, as to executors, is, that it is adduced to rebut a presumption raised against the legal title of the executor. 2 *P. Will.* 159. *Note 1. 4 edit.*

CHAP. V. *Of Devises.*

1. THE intention of the testator is called, by lord *Coke*, the pole-star, to guide the judges in the exposition of wills.

And it is a rule in the construction of them, that the same be most favourably expounded, and to pursue, if possible, the will of the testator, who, for want of advice or learning, may have omitted the legal and proper phrases. And, therefore, the law many times dispenses with the want of words in devises, which are absolutely requisite in all other instruments; as a fee may be conveyed without the words of inheritance. But, notwithstanding the mind of the testator, if possible, should be pursued; yet it must be so as his intent might stand with the rules of the law, and not be repugnant thereto; it being also a rule, that the last will of the testator is to be fulfilled according to his true intention; but the spirit of the law is to be preserved. *Shep. Touch.* 416.

Effect must be given to all the words of a will, if possible; and the intention of the testator must prevail, if consistent with law. *Doug.* 308.

If there be two clauses in a will so totally repugnant to each other that they cannot stand together, the latter shall be received and the former rejected: wherein it differs from a deed; for there, of two such repugnant clauses, the former shall stand. Which is owing to the different natures of the two instruments; for the last will and first deed is always most available in law. Yet, in both cases we should rather attempt to reconcile the repugnant clauses. 2 *Black. Com.* 381.

In *Rivers's* case, *M.* 1737. The testator, by his will, gave certain lands to his 2 sons, James and Charles Rivers. It appeared that they were illegitimate children; and the question was, whether this is such a description of their persons as will entitle them to take under the will. By lord *Hardwicke*: In the case of a devise, any thing that amounts to a *designatio personæ* is sufficient; and though, in strictness, they are not his sons, yet, if they have acquired that name by reputation, in common expression they are to be considered as such: It hath been objected also, that the testator hath made a mistake in their names, and that therefore they cannot take; but the law is otherwise; for if a man is mistaken in a devise, yet, if a person is clearly made out by averment to be the person meant, and there can be no other to whom it may be applied, the devise to him is good. 1 *Atk.* 410.

But although by the law, the intention is more to be considered than the words; yet such intention must be collected out of the words, and it must consist with the law. *Swin.* 10.

And

And this intention must be collected from the will itself, and not from any parol evidence concerning it. *Lovelass*, 148.

Thus, in the lord *Cheiney's* case, *M. 33 & 34 El.* Sir Thomas Chieney, knight, lord warden of the cinque ports, made his will in writing, and thereby devised to Henry his son, divers manors, and to the heirs of his body; the remainder to Thomas Cheiney, of Woodley, and to the heirs male of his body, upon condition *that he or they, or any of them shall not aliene or discontinue*. And the question was in the court of wards, between Sir Thomas Perot, heir general to the lord warden, and divers purchasers of Sir Thomas Cheiney, whether the said Sir Thomas Perot shall be received to prove, by witnesses, that it was the intent and meaning of the deviser, to include his son and heir within these words of the condition [*he or they,*] and not only to restrain to Thomas Cheiney, of Woodley, and his heirs male of his body. But Wray and Anderson, chief justices, upon conference had with the other justices, resolved, that he shall not be received to such averment out of the will; for a will concerning lands ought to be in writing, and not by any averment out of it; for it will be full of great inconvenience, if none shall know, by the written words of a will, what construction to make, or what advice to give; but the same shall be controuled by collateral averments out of the will. But if a man hath 2 sons, both baptized by the name of John, and thinking that the elder (who hath been long absent) is dead, deviseth his land, by will in writing, to his son John generally, and in truth the elder is living; in this case the younger John may, in pleading or in evidence, alledge the devise to him; and if this be denied, he may produce witnesses to prove the intent of his father, that he thought the other to be dead, or that, at the time of making the will, he named his son John the younger, and the writer omitted the addition of the younger; and in this case no inconvenience can arise; for he who shall see the will by which the land is devised to his son John, cannot be deceived by any secret invisible averment; for when he shall see the devise to his son John, he ought at his peril to enquire what John the testator intended, which may easily be known by him who writ the will, and others who were privy to the intention; and if no direct proof can be made of the intention, then the devise is void for the uncertainty. *5 Co. 68.*

One devises all his estate in G and W, and *elsewhere* in the kingdom of England, to trustees, subject to certain charges thereon, and limitations in his marriage-settlement named, in trust, to stand seised of the said estates in G and W, or *elsewhere*, to certain uses. His estate in G and W were the only estates charged or mentioned in his marriage-settlement; but he was also entitled to a *reversion* of certain estates in O and U. And it was held, that this *reversion* passed by the words *elsewhere* in the kingdom of England. *Freeman v. Duke of Chandos. Cowp. 363.*

I. H. having 2 sons, M. and I. devised to M. in fee; and if M. die before me, then my son I. shall enjoy the lands as M. should have done; and also, if M. should die before the said I. H. he the said I. H. junior, shall have the lands: M. survived the testator, and left issue: it was adjudged, that the words *said I. H.* without the word *junior*, means the testator. *1 Wils. 148.*

A feme

A feme-covert, as executrix to A, and administratrix to B, is entitled to £700. bank stock; her husband devises to her £700. India stock, which he is interested in or entitled to: and after the making his will, she transfers the bank stock to him: it shall pass by the words India stock, for he had no other stock. 1 *Wils.* 247.

In the case of *Frammingham v. Brand*, the question was upon these words in a will, *viz.* "I give and bequeath the inheritance, in fee-simple, of all my lands, to R. F. my son, and to his heirs and assigns for ever; and in case the said R. F. my son, happen to die in his minority, *or* unmarried, *or* without issue, then I give the inheritance, in fee, to H. B." R. F. attained the age of 21, but died unmarried and without issue. Lord chan. Hardwicke held, that this contingent executory devise to H. B. could never take place, for both the words *or* are to be taken in a copulative sense; and unless R. F. had died in his minority, *and* unmarried, *and* without issue, H. B. could never take; for, if this was to be construed otherwise, it might happen, that R. F. might marry, and die, leaving issue, in his minority, *which* would be disinherited if the estate was not to vest in him absolutely on his marriage, which could never be the intent of the testator; and the case of *Barker and Surtees*, *B. R. Mich. 16 Geo. 2.* was held to be good law, which was adjudged upon these words in a will, *viz.* "I give the said premises to my grandson, his heirs and assigns; but in case he dies before he attains the age of 21 years, or marriage, and without issue, then he devised the same over to another person." The first devisee attained 21, but died unmarried, and without issue; and it was held *per totam curiam*, that, by attaining the age of 21, the estate became so absolute in the first devisee, that the executory devise could never take effect or rest: and Dennison, justice, said, he would consider it the same as if the testator had said, "If my grandson, A. B. die under 21, and unmarried, and without issue," which he did not do, for he attained his age. 1 *Wils.* 140.

Common pleas. *Henry Lanchester vs. Elias Smerdon*: in debt on bond, for £148. 4s. 8d. sterling. May term, 1794. The jury found the following special verdict:—"We find for the plaintiff 1s. damages, and costs of suit; subject to the opinion of the court of common pleas on the following case, *viz.* That Alexander Russell, by his will, duly executed under his hand and seal, in the presence of three witnesses, and bearing date the 4th day of February, 1771, did (among other things) give, devise, and bequeath unto his two sons, Alexander and Robert, and to their heirs and assigns for ever, share and share alike, testator's low-water lot and wharf in Charleston, as high as the east end of his kitchen; and in case his sons should happen to die before 21 years of age, and without issue, then he gave and bequeathed the same unto his three daughters, Jane, Elizabeth, and Margaret, and to their heirs and assigns for ever, share and share alike. *Item.* The said testator did also give, devise, and bequeath unto his said daughters, share and share alike, all that other part of his said lot, from the said east end of the said kitchen, southwardly, as far as Mr. Richard Muncrief's land, and westwardly as far as Bay-street; but if any of his said daughters should happen to die before the age of 21 years, *or* without

without issue lawfully begotten, the said testator gave, devised, and bequeathed the part of such child or children so dying, unto the survivor or survivors of them, and to their heirs and assigns for ever, share and share alike. Testator afterwards departed this life, without revoking or altering his said will; and his two sons died also without issue; whereby the estate vested in the three daughters.—Jane, the eldest, intermarried with Henry Lanchester, and has no issue: Elizabeth and Margaret are married, and have both issue. A partition of the property took place under the directions of the court of common pleas, and Lanchester and his wife have sold part of the devised premises to the defendant, Elias Smerdon, who gave the bond on which this action is brought, and who contends that he is not subject to payment of the same, because, if Mrs. Lanchester departs this life without issue, the said estate will descend to her heirs, viz. her sisters, or their representatives, she being seised in fee-tail, and not in fee-simple, under her father's will. T. Bowles, plaintiff's attorney, Geo. Taylor, defendant's attorney.

Strange, 1175. 1 *Eq. Ca. Ab.* 188.

The court were unanimously of opinion in this case, and without argument, (for it needed none) that a fee-simple property vested absolutely in Jane, after her attaining 21 years of age: besides, the land left to her and her sisters was absolutely given; and as for the land left the sons, and in case of their dying under 21, then to devolve to the sisters, they took as heirs to the brothers, and not as purchasers under the will.—Mr. Rutledge, Burke, Grimké, and Bey. *August 13, 1794. Charleston.*

But the rule hath received a distinction of late, which hath greatly prevailed, between evidence offered to a court, and evidence offered to a jury. For, in the last case, no parol evidence is to be admitted, lest the jury should be inveigled by it; but, in the first case, it can do no hurt, being to inform the conscience of the court, who cannot be biassed or prejudiced by it. And accordingly, in divers instances, collateral evidence hath been admitted in the court of chancery, to explain the testator's intention. *Law of Test.* 306. 2 *Bac. Abr.* 309.

And in the case of *Selwin and Brown*, M. 1734, lord Talbot admitted, that it had sometimes been allowed. *Cas. Talb.* 240.

But, notwithstanding these cases, the courts have been very unwilling to admit of parol evidence in relation to any thing that appears on the face of a will; and it is certain, that too much caution cannot well be used in this particular; especially when it is considered, that the statute of frauds and perjuries, which was made to prevent perjury, contrariety of evidence, and uncertainty, binds the courts of equity, as well as the common law courts; as also, that little regard ought, in many cases, to be had to the expressions of the testator, either before or after the making his will, because, possibly, these expressions might be used by him on purpose to conceal or disguise what he was doing, or to keep the family quiet, or for other secret motives and inducements, which cannot, after his death, be found out. 2 *Bac. Abr.* 310.

And in the case of *Lowfield and Stoneham*, M. 20 G. 2. Upon plene administravit pleaded, the question was, whether £1000. received by the

the defendant, was due to her in her own right, or as executrix of her husband, and consequently assets. And it arose upon the following devise: "I give to my loving brother, John Stoneham, £1000. and in case of his death, to his wife Susannah," (who was the defendant.) It appeared that John Stoneham survived the testator. And therefore the plaintiff insisted, this legacy (which the defendant admitted that she had received) vested absolutely in him, and was assets in her hands. On the part of the defendant, it was offered to give in evidence, that the testator in extremis declared, he meant only to give his brother the interest of the £1000. and that the defendant should have the principal in case she survived him. The parol evidence was opposed by the plaintiff's counsel, as being contradictory to the plain words of the will. And Lee, chief justice, said, it could not be allowed; and that, in the case of *Selwin and Brown*, (aforesaid,) the house of lords had refused it, even where it was to support the legal interpretation of the will; and lord Hardwicke, about two years ago, held it in the same manner in the case of the * earl of *Inchiquin and O'Brien*. *Str.* 1261.

And in the case of *Ulrich and Litchfield*, July 23, 1742; the testatrix bequeathed her real and personal estate, to Elizabeth Travers and James Ulrich, equally between them for life; and upon the death of Elizabeth Travers she gave the whole estate to James Ulrich, in tail general; and for want of such issue, to Richard Ulrich, in fees; with a few pecuniary legacies; and charged her real estate with payment of these legacies, if her personal estate should not be sufficient; and by her will declared, she gave all the *rest and residue of her personal estate* to her uncle, Leonard Collard's 3 daughters; and particularly gave to Mrs. Susannah Litchfield £10. and made her executrix. For the residuary legatees, it was insisted, that *rest and residue* of her personal estate, must mean the residue after the particular legacies are paid off; and could not refer to the beginning of the will, because there is a fee devised, and consequently the testatrix has disposed of the whole. That parol evidence, in this case, may be admitted of the attorney who drew the will, that he had express directions to give the personal estate to the 3 daughters of Leonard Collard: That, (to be sure) things which are quite contrary to the will, shall not be proved by parol evidence, but that it may be allowed to explain words in a will, especially in this case, where it appears to be a mere blunder in the drawer: That this doth not intrench upon any of the rules with regard to parol evidence, but only clears up who was intended to have the personal estate, where the whole is devised to 2 different persons; and that it seems clearly to be a blunder in the drawer of the will, because the devise in the first part of it is proper only in the disposing of real estate. By the lord chancellor Hardwicke: As to the question, whether I ought to admit parol evidence to explain the intention of the testator, I am of opinion, that this is not a case in which parol evidence can be read, and would be of dangerous consequence; it is true, there are some things here which would make a judge wish to admit it; but I must not follow my inclinations only, for I do not know, that, upon construction of a will, courts of law or equity admit parol evidence, except

* See this case in 1 Wils. 82.

except in 2 cases: First, to ascertain the person, where there are 2 of the same name, or there has been a mistake in a christian or surname, and this upon absolute necessity; where, if such evidence were not let in, it would make the will void. The other case is, with regard to resulting trusts relating to personal estate; where a man makes a will, and appoints an executor, with a small legacy, and the next of kin claim the residue; in order to rebut the resulting trust for the next of kin, parol proof hath been admitted to ascertain the person who was to have the residue. It is very true, cases may be cited where lord Cowper has admitted such evidence; for he went upon this ground; that it was by way of assisting his judgment, in cases extremely dark and doubtful. I have the greatest deference for his judgment, but must own, I was never satisfied with this rule of lord Cowper's, of admitting parol evidence in doubtful wills; besides, he went further in the great case of *Strode and Russel*, (2 *Vern.* 621.) in which there was an appeal to the house of lords: Mr. justice Tracy, who assisted lord Cowper in that cause, was at first of the same opinion with him, but, upon considering it more, disavowed his first opinion, and was clear, that it could not be admitted; and this alteration in his judgment was mentioned in the house of lords. In the case of *Selwin and Brown*, I was of opinion, that it ought to have been admitted; and even lord Talbot, when he had heard the cause, had a remorse of judgment, at the same time that he rejected the parol evidence: But the house of lords refused it as of most mischievous consequence, and affirmed his decree. In the present case, here is in the will undoubtedly a contradiction and repugnancy; for, in the first place, she has given all her personal estate to the plaintiff, and yet legacies come afterwards, and a devise of the residue: What then must be the construction? As to the general question, where the same thing is described generally, and given to 2 different persons in the former and latter part of a will, lord Coke was of opinion, the latter words shall revoke the former; but in *Plowden* it is said, they shall take as joint-tenants. I own the reasoning in *Plowden* is not convincing to me; I rather incline to lord Coke's, though the later cases have taken it otherwise: But no certain rule is to be laid down as to construction of devises: So says *Swinburne*, but that they must depend upon their particular circumstances: Upon the whole of what *Swinburne* says, the result is this: That if the same thing be given to 2 persons, they shall take as joint-tenants, unless there is something to indicate and prove the intention of the testator to revoke and vary the devise. Now, try the present case by this rule, and see if it doth not come exactly within it. The testatrix, by giving legacies after the devise of all the personal estate, has varied the will for so much. It is truly said, that a man may give the whole in a former part, and qualify it afterwards, and still the first legatee is entitled in part. But here, in case the whole personal estate should not be sufficient to pay the legacies, she charges the real estate with them, upon a supposition that the other might not be sufficient; and therefore is a plain indication of her intention, in one event, totally to revoke the devise of the personal estate. And there being an alteration of her intention before she finishes her will, the construction is, she hath altered

ed her intention throughout, and the plaintiff is not entitled to any part of the personal estate, but the residue belongs to the 3 daughters of Leonard Collard. And decreed accordingly. 2 *Atk.* 372.

In the case of *Fonnereau and Poyntz*, July, 1785, the admission of parol evidence being contended for, it was observed, that the court would not admit it to raise a title or gift: but where the title or gift is raised, and there is a doubt as to the person, or other circumstances, then parol evidence shall be admitted. And here lord Thurlow observing, in his discussion, that every evidence, as to the description of the subject, the testatrix described, must be admitted; and his opinion was, that the court let in evidence of the value of the estate, not to controul the bequests which the testatrix had made in words themselves distinct, nor to controul a bequest which she had made of a subject she had accurately described; but because the words which she had used in the description were, upon the whole of the context, uncertain. *Bro. Chan. Rep.* 472.

M. 1780. *Maybank and Brooks*. In this case it was contended for parol evidence to be let in, to prove that the testator knew, at the time of making the will, that the legatee was dead; but it was not admitted. *Bro. Cha. Rep.* 84.

A testator gives his wife, by will, a legacy of £1400. and an estate in land; she, as executrix, insists, that she is entitled to have a distributive share of the personal estate undisposed of, notwithstanding her legacy and the devise of land to her, for that the testator frequently declared his intention that she should have the residue. Lord chancellor said, if making a wife executrix, of itself, should be allowed to be a good reason why she should have the residue, when she has a considerable legacy, we shall not know where to stop. But, where a wife is executrix, and there is a great affection proved to be between them, as here is, it is very reasonable to admit this kind of parol proof, and a less evidence than this would have turned the scale in her favour. 1 *Wils.* 313.

And notwithstanding that wills are generally favoured by the law, yet, where the testator endeavours to establish a settlement against the reason and policy of the common law, the judges will reject it. *Gillb.* 110. 2 *Bac. Abr.* 79.

Also, where the testator, by his will, maketh no other disposition of his estate than the law itself would have done, had he been silent; there such a will is useless, and shall be rejected: and, therefore, if a devise be made to a person and his heirs, which person is heir at law to the devisor; this is a void devise, and the heir shall take by descent as his better title; for the descent strengthens his title, by taking away the entry of such as may possibly have right to the estate; whereas, if he claims by devise, he is in as by purchase. *Gillb.* 110. 2 *Bac. Abr.* 79.

So, if I devise land to my wife, for her life, and, after her death, the same lands, in fee-simple, to my son, who is my heir at law; or if I devise it to my executors, for a term of years, and, after the expiration thereof, to my son, in fee-simple; in neither of these cases shall he take the land by the will; because, if no such devise had been made,

made, he would have had the land after the death of my wife,* or after the expiration of the term of years. But if I create another estate by my will than would have descended to my heir at law, or where the quality of my estate is altered by the devise, there the disposition of the will shall prevail, though it be made to the heir at law: as where a man may have a son and a daughter, and deviseth, that his land shall descend to his son, and if he die without issue of his body, that then the same shall go over to the daughter; the son, by this devise, takes an estate tail, though heir at law to the devisor; because here is an estate tail created by the will, and the heir must take under the will, or the remainder to the daughter would be void: for the will, altering the quality of the estate, ought to prevail. *Gil. on wills, 114. Law of Test. 154.*

Also, devises are void and rejected, where the words of the will are so general and uncertain, that the testator's meaning cannot be collected from them; and therefore, where a man, by will, gave *all* to his mother, the general words did carry no *lands* to his mother: for since the heir at law hath a plain and uncontroverted title, unless the ancestor disinherits him, it would be severe and unreasonable to set him aside, unless such intention of the testator is evident from the will; for that were to set up and prefer a dark, and at best but a doubtful title, to a clear and certain one. *Gilb. 112. 2 Bac. Abr. 81.*

Subsequent words in a will or deed may qualify the extent of prior general words: as, if one devises to his son W. S. when he shall accomplish the full age of 21 years, the fee-simple and inheritance of L, to him and his child or children for ever. But if my son W. S. shall die before he shall accomplish the full age of 21, then I give and bequeath the fee-simple and inheritance of L, to my wife E. S. forever. Here, although a fee-simple appeared to be given, in the beginning of the will to his son, yet W. S. took only an estate tail to him and the heirs of his body, with reversion to himself in fee by descent. *Davis Stevens. Doug. 306.*

One gives the fee-simple of his bigger house to A, and after A's decease, to B, the son of A; this passes only a life estate to A. *Doug. 309.*

2. A devise, made *in fee-simple*, without express words of heirs, is good in fee-simple: But if a devise be made to A. B. he shall have the land but for term of life; for these words will carry no greater estate. *Terms of the Law, tit. Devise.*

To make a devise of lands a fee without any limitation, such a manifest intention must appear, that the testator meant to give a fee, as may satisfy the conscience of the court in pronouncing it such: if it is barely problematical the rule of law must take place. *Roe v. Blckett. Cowp. 235.*

If a man devise all his *estate which he hath in such a place*, without mentioning the heirs of the devisee; courts of equity have held, that it shall extend to such heirs, for that the word *estate* implies the whole property and interest therein: especially in the case of children, to whom the parent, unless there is some express limitation, cannot intend a life estate only. By lord Hardwicke, in the case of *Bailis and Gale*, Nov. 6, 1750. *2 Vez. 48.*

It

* Gilbert on wills, 113. Law of Test. 153.

It is now clearly settled, that the words "*all his estate*," will pass every thing a man has: but if the word "*all*," is coupled with the word "*personal*," or a "*local description*," there the gift will pass only "*personalty*," or the "*specific estate particularly described*." *Hogan v. Jackson. Cowp. 306.*

As if one devises "*all his estate at A*;" this passes only a life estate, though the testator had marked his disapprobation of his heir at law, by a legacy of one shilling. *Doug. 734.*

"*As to all my worldly substance*:" these words import every property a man has.—"*Real effects*" mean "*real*" property. *Hogan v. Jackson. Cowp. 307.*

"*All my interest*," passes an estate in fee-simple. *Doug. 733.*

A testator, seised in fee, by will, expresses himself thus, at the beginning thereof; "*As to my temporal estate*," I dispose thereof as follows: and afterwards says, all the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, tenements, &c. without mentioning the word "*estate*," or "*other words of limitation*," such devise will pass a fee. 1 *Wils. 333.*

The word "*hereditaments*" may, in a will, be a fee; so, if I make one my "*heir*;" or the word "*reversion*" may give a fee; or if one "*gives*" his houses to A. B. to "*pay his debts*;" or devises to one "*to sell*;" or a devise of houses "*charged with debts*," which takes money out of the pocket of the devisee. 3 *Wils. 418.*

If lands be devised to a man, to have to him *forever*, or to have to him and his assigns;* in these two cases, the devisee shall have a fee-simple: but if it be given by feoffment, in such manner, he hath but an estate for term of life. *Terms of the Law, tit. Devise.*

If a man devise his land to another, to give, sell, or do therewith at his pleasure, or will; this is fee-simple. *Id.*

One begins his will thus; "*As touching all my temporal estate, &c.* I give and dispose thereof as follows: item, to W. W. 2 houses at S, and so on: and it is my will, that none of the houses and land named above, be entered into by the above-named W. W. &c. until the decease of my executor." Lord chief justice De Grey said, there was no case where the testator makes use of these, or the like words, "*as touching the disposition of all my temporal estate*, I give and dispose thereof as followeth, and immediately afterwards devises his several estates, or his several lands, to divers persons, that ever was determined a fee:" these are words *descriptive* only of the particular estates or lands, as to *locality*, and not of the quantity of his estate in those lands, and so do not carry a fee. By the words "*all my estate*," the testator must be understood to mean the thing, viz. his lands, and not the quantity of estate (a fee) which he had in those lands. There is a great difference between the description of the thing, estate, or lands devised, and the quantity of interest or estate in the thing, estate, or lands devised. 3 *Wils. 418.*

A devise

* Query, Whether the words "*for ever*" are not omitted here; for Wentworth says, "*if a devise be to a man and his assigns, without saying 'for ever,' the devisee hath but an estate for life.*" p. 274.

A devise made to one and to his *heirs male*, doth make an estate * tail; but if such words be put in a deed of feoffment, it shall be taken for fee-simple: because it doth not appear of what body the heirs male shall be begotten. *Id.*

A devise after failure of the issue or heirs of A, without any previous limitation to such issue or heirs, is void in its creation. *Doug.* 488.

Note.

If lands be given by deed to one, and to the *heirs male of his body*, who hath issue a daughter, who hath issue a son, and dies; there the land shall return to the donor, and the son of the daughter shall not have it, because he cannot convey himself by heirs male, for his mother is a lett thereto: but otherwise it is of such a devise; for there the son of the daughter shall have it rather than the will shall be void. *Id.*

Devise to T. G. "*for and during his natural life,*" and after his decease, to his heirs and assigns for ever; and for want of such heirs, to T. E. his heirs and assigns for ever. T. G. has only an estate tail. *Morgan and Ux v. Griffith.* *Cowp.* 234.

Words in a will which are sufficient to pass a *fee-simple*, may be restrained, by subsequent words, to mean an estate tail. *Doug.* 253, 728.

If lands be given by deed to one and *his heirs for ever*, and *if he die without heirs*, then to his brothers or sisters, this last is void, because the first gift conveyeth unto him the fee-simple; but in a will, such devise over is good, and such limitation shall convey but an estate * tail: as in the case of *Tyte and Willis*, *M.* 7 G. 2. The testator devised his lands to his wife *Jane* for life, remainder to his son *Henry* for life, remainder to his son *George and his heirs for ever*; and if he died *without heirs*, then to his two daughters *Catherine and Jane*. The question was, whether *George* took a fee-simple, or only an estate tail. And the case of *Webb and Hearing*, *Cro. Ja.* 415, was cited, to prove, that where a devise is to one and his heirs, and if he die without heirs, remainder over to another, who is, or may be the deviser's heir at law, such limitation shall be good, and the first limitation construed an intail, and not a fee, in order to let in the remainder man; but where the second limitation is to a stranger, it is merely void, and the first limitation is a fee-simple. And by the lord chancellor: In this case, *George* took an estate tail. The difference which hath been taken is right; and the reason of it is, that in the latter case, there is no intent appearing, to make the words carry any other sense than what they import at law; but in the former, it is impossible that the devisee should die without an heir, while the remainder man, or his issue continue. And therefore the generality of the word *heirs*, shall be restrained to heirs of the body; since the testator could not but know, that the devisee could not die without an heir while the remainder man, or any of his issue, continued. *Cas. Talb.* 1.

And in *Webb*, and *Hearing*, a limitation was to the testator's son, and

* The statute of Westminster 2d. 13 Ed. 1. c. 1. entitled DE DONIS, &c. not being of force here, the words HEIRS MALE would create only a conditional estate in this country.

and if the testator's 3 daughters should over-live their brother and *his heirs*, then to them. The words *his heirs* mean *heirs of the body*; because the daughters could never over-live the collateral heirs of the son, coming under that description themselves. *Doug.* 253, 4.

But in the case of *Tilburgh and Barbut*, March 2, 1748; where the remainder man, being of the half blood, could never possibly inherit, it was decreed by lord Hardwicke, that this being a fee mounted on a fee, it vested in the first taker, and the remainder over to the half brother was merely void. 3 *Atk.* 617. 1 *Vez.* 89.

Nothing contained in this act shall be construed to vest in the state the property of which any person died possessed, interested in, or entitled to, where such person has left any relation of the half blood; but the same shall be, and is hereby vested in such person of the half blood. 14 §, No. 1490, *Pub. Laws*, p. 430.

If one devise to an *infant in his mother's womb*, it is a good devise; but otherwise by feoffment, grant, or gift; for in those cases there ought to be one of ability to take presently, or otherwise it is void. *Terms of the Law.*

If one devise to a person, by his will, *all his lands and tenements*; here not only all those lands that he hath in possession do pass, but all those that he hath in *reversion*, by virtue of the word *tenements*. *Id.*

If a man hath lands in fee, and lands for years, and deviseth *all his lands and tenements*; the fee-simple lands pass only, and not the lease for years: but if a man hath a lease for years, and no fee-simple, and deviseth *all his lands and tenements*; the lease for years passeth, otherwise the will would be merely void. *Cro. Car.* 293.

One, possessed of three species of estates in the county of H. viz. one by articles wholly executory, another executory in part, and a third (being an advowson) completely *executed* by a recent conveyance, devises to his wife all the manors, messuages, *advowsons*, and hereditaments, in the county of H. *for the purchase whereof I have already contracted and agreed*, or in lieu thereof, the money arising by the sale of my real estate in the county of L. (with directions for completing the contracts.) The advowson (although the purchase was completely executed before the making of the will) shall pass to the wife. *St. John v. Bishop of Winton.* *Cowp.* 94.

The words (all my *lands*) in a devise, will pass a *house*; but the devise of a house doth not pass lands. *Mo.* 359.

A devise of a *messuage*, will carry with it a garden and curtelage; otherwise of a *house*, unless it be *with the appurtenances*. 2 *Cha. Ca.* 27.

The testator devised a house *with the appurtenances*. The question was, whether land in a field passed. And it was adjudged, that the land did pass; for it was in a will, in which the intent of the deviser shall be observed. *Godb.* 40.

By a devise of three messuages, with all houses, barns, stables, stalls, &c. that stand upon or belong to the said messuages; *the lands belonging to the messuages shall pass*; for the testator manifested his intention to dispose of his whole estate, by the beginning of his will: "*As touching such worldly estate wherewith God hath blessed me, &c.*" *Gulliver, v. Poyntz.* 3. *Wils.* 141.

A devise

A devise of the *inheritance*, hath been held to be a devise of the lands. *Sty.* 308.

If lands are devised to trustees, without the word *heirs*; yet, by implication, they must have an estate of inheritance sufficient to support the trust: for there is no difference between a devise to a man for ever, and to a man upon trusts which may continue for ever. 1 *Abr. Cas. Eq.* 176.

If lands are devised to a man, *paying several sums* in gross, he hath a fee, though all the sums together do not amount to the annual rent of the land: for the devise shall be intended for his benefit; and if he had only an estate for life, he might die before he received the legacies out of the land, and consequently be a loser. *Id.*

So, if lands are devised to a man, in consideration that he *release a sum of money* due to him, he has a fee-simple, on his release of the debt: for the devise being intended for his benefit, an estate for life might be determined before he could receive the sum out of the land. *Id.* 177.

But if lands are devised to a man, paying so much out of the *profits* of the lands, he takes but an estate for life: for, although he takes the land charged, yet he is to pay no farther than he receives, and so can be no loser. *Id.*

One, seised of the lands of C and G in fee, of other lands in B and B, for lives, renewable for ever; and other lands under leases for 3 lives, with reversionary terms, for 21 years from the death of the surviving life in each, and being himself the surviving life in one, devises thus: And as to all my *worldly substance*, I give to my mother my house and land of G, with the appurtenances, during her *natural* life, clear of any deduction; and also my lands of C, (subject to a rent payable thereout) *for life*, without liberty of committing waste thereon: and, after several legacies to relations, (one of which was the heir at law) he devises to his mother all the remainder and residue of all his effects, both real and personal, which he shall die possessed of. The mother, by this residuary clause, takes a fee in all the testator's fee-simple estates, and the whole of his interest in the rest of his real property, subject to the charges thereon. *Hogan v. Jackson. Cowp.* 299.

But if one devises a *reversion* to his right heirs, and afterwards gives *all the residue* and remainder of his real and personal estate to A B, in fee, the *reversion* does not pass by this residuary clause. *Doe v. Saunders. Cowp.* 420.

A man devised, that his lands should descend to his son; but he willed, that *his wife should take the profits thereof, until the full age of his son, for his education and bringing up*, and died. The wife married another husband, and died before the full age of the son. And it was the opinion of Wray and Southcote, justices, that the second husband should not have the profits of the lands, until the full age of the son; for nothing is devised to the wife but a trust, and she is as guardian or bailiff, for the benefit of the infant, which by her death is determined; and the same trust cannot be transferred to the husband: but otherwise, if he had devised *the profits of the land unto his wife, until the age of the infant, to bring him up and educate him*; for that is a devise of the land itself. 2 *Leon.* 221.

3. When

3. When any estate or effects is intended for a married woman, it is generally devised or bequeathed to some person in trust for her, or to be for her sole and separate use, with directions, that her receipt alone shall be a sufficient discharge for the same; as thereby to prevent what is given being subject to the husband's controul. If any real estate is devised to her in fee-simple, and without any restriction, it immediately vests in her on the testator's death, and becomes subject to the husband's curtesy, and to their conveyances, as any other estate that the wife may have been seised of in fee-simple or fee-tail, on her marriage. *Lovelass*, 94, 157.

But, if any legacy, or personal estate, is given to a married woman, absolutely, without any restriction, it will be as if the same were given to the husband. 1 *Vern.* 261. *Law of Test.* 250.

H. 1724. *Rollfe and Budder.* Devise of a bond by the son, to his mother, to her sole and separate use: It is her sole property in equity, and her assignment of it is good. *Bunb.* 187.

So in the case of *Bennet and Davis*, *M.* 1725. A person, seised of an estate in fee, devised it to the defendant's wife, who was his daughter, for her separate use, without any limitation to trustees: It was adjudged, that the husband was but a trustee for the wife. 3 *P. Will.* 316.

Devise to one for life, and after, to her issue; and, if she has no issue, power to dispose thereof at her will and pleasure, the whole court was clearly of opinion, that the devisee took an estate in fee-simple, by the will, as the contingent remainder to the issue never vested. 2 *Wils.* 6.

A. being cestui que trust of a term in black-acre, afterwards purchases the fee in his own name, and devises black-acre in fee to his heir, whom he makes executrix and residuary legatee, who is a feme-covert, and dies: the term shall go with the fee to the heir at law, and not to her husband, who is her personal representative. 2 *Wils.* 329.

4. If a devise be made to a man, and to the heirs female of his body begotten; and after, the devisee hath issue a son and daughter, and dieth; here the daughter shall have the land, and not the son. *Terms of the Law.* Devise.

5. A man devised his personal estate *for the use of his relations*, without specifying any in particular, or using any other words, and made an executor, and died. His mother, and three sisters, brought their bill, as nearest relations, for a discovery and account of the personal estate, and to come in according to the statutes for distribution. And it was agreed to be the rule, in construction of such devises to relations, that those who would, by the statutes for the distribution, be entitled to the personal estate, in case the testator had died intestate, should, upon such general devises, be admitted in the same proportion only. And the lord chancellor Cowper said, he thought it the best measure for setting bounds to such general words, and that it had been often ruled accordingly in that court. *Roach and Hammond*, *E.* 1715. *Prec. Cha.* 401. 2 *Abr. Eq. Cas.* 438.

For if, upon such general devise, they were not to take in this manner, it would be uncertain; for the relations may be infinite. And in the

the case of *Carr and Bedford*, 30 C. 2. where the testator devised the residue of his estate *among his kindred, according to their most need*; it was determined that this shall be construed according to the statute of distribution. 2 *Cha. Rep.* 146. 2 *Abr. Eq. Cas.* 365.

So in the case of *Thomas and Hole*, M. 1734. A man devised £ 500. to the *relations of A, to be divided equally between them*. A had, at the testator's death, two brothers living, and several nephews and nieces by another brother. It was determined, that no relations should take by this description, that could not take by the statute of distribution. *Cas. Talb.* 251.

Whether the *wife* is a relation in this respect, hath been made a question. As in the case of *Davis and Bailey*, Feb. 8, 1747. The testator, by his will, gave the residue of his personal estate to his wife for life, remainder to such of his relations as would have been entitled by the statute in case he had died intestate. The wife claimed a moiety. By the lord chancellor Hardwicke: *Relation* here means *kindred*. The *wife is not of kindred*, nor a relation within the meaning of the statute.

And more particularly, in the case of *Worsley and Johnson*, M. 27 G. 2. The testator, seised in fee, deviseth his estate to his wife for life, remainder to another in tail, and, for want of issue, the reversion in fee to be sold; with these words, *And my mind is, that the money arising from the sale be divided amongst such of my relations, and in such manner as the statute of distributions directs*: Then he gave other legacies to his wife, and appointed her sole executrix, and died; leaving relations of his own blood, and his said wife, who married a second husband. Then the wife dies; and the second husband dies; and the tenant in tale dies without issue. The plaintiff brings his bill, as executor to the second husband, praying a sale of the estate, and a moiety of the money thence arising, as the representative of the second husband to the wife, who is entitled to it by the will, as a relation within the statute of distribution.—Lord chancellor Hardwicke: During the course of this cause, I have altered my opinion. The question arises on the words of the will referring to the statute of distribution, and depends upon the construction, which must be agreeable to the words, and to the intent of the testator, to be from thence collected. The question is, what is the sense of the word *relation*, as used in this will? In a proper grammatical sense, it denotes a quality in the abstract; but in common sense, it becomes personal, and signifies the same as *my kindred*. Now, *next of kindred* are the words in the statute to which he refers, and takes in only relations by consanguinity or by blood. Now it seems strange to say, that a man's wife is no relation to him; but she certainly is not in this sense, neither by blood nor affinity. The etymologists, when they speak of *consanguinity*, say, that it is, *vinculum personarum ab eodem stipite descenditium*; and of *affinity*, they say, *uxor non est affinis, sed causa affinitatis*. And so the word appears to be used in our statutes: for if the wife was of kin to her husband, she would exclude all the rest, as being the nearest of kin. So in the* 21 H. 8. c. 5. the ordinary shall grant administration to the widow, or next of kin; which distinguishes the wife from the kindred. This

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perhaps

* Not of force here.

perhaps would be too nice a construction of the will, unless the manifest intent of the testator would warrant it; for wills are to be construed according to common understanding, and not by nice grammatical distinctions. Now, in this will he has made an ample provision for the wife; and whenever he gives her an interest, he expressly mentions her. It was probable that this remote contingency would not happen in her life; and he could never intend, that her representative, such as the executor of a second husband, should carry so considerable a share from his own blood. Suppose he had said, *my own relations*; he would certainly be construed to mean his relations by blood. Therefore, in this strict sense of the words, the wife is not entitled to any share. And I continue in the same opinion I was of in the case of *Davis and Bailey*; which is expressly to this point. And, therefore, I dismiss the bill; but without costs. 3 *Atk.* 758.

6. If money be devised to younger children, where there are divers daughters, and a son, and the son is by birth a younger child, but heir at law to the inheritance; the son shall not be considered as a younger child, so as to take by the devise. 1 *Abr. Eq. Cas.* 202. *Bretton and Bretton*, 12 *C.* 2.

In the case of *Becke and Becke*, *H.* 1713. The testator, being tenant in tail, had power, by deed or will, to charge the lands with £2000. for portions for younger children, living at his death. He had only two daughters, and the younger was born after his death. He charged the lands by his will for raising this £2000. And the question was, whether it should be raised. It was objected, that the elder daughter was not entitled to any part of it, because it was only to go to the younger children; and the younger daughter cannot claim any part of it, because she was not living at the time of his death. But by the lord chancellor Harcourt: The eldest daughter, though first born, when there is a son, hath been often ruled to be a younger child. Every one but the heir is a younger child in equity; and the provision which such daughter will have is but as a younger child's, in regard the son goes away with the land as heir; so here, the estate goes all to the remainder man, who is *heres factus*, and neither of the two daughters is heir. And as to the younger daughter, he said, it would be very hard in a court of equity, that a child, because it happened not to be born at such a time, must therefore be unprovided for; but the law so far regards an infant *in ventre sa mere*, as, in this respect, to look upon it as living at the time of the father's death. 1 *P. Will.* 244.

7. In the construction of devises, if there be no words of limitation added, nor words of perpetuity annexed, which have been held tantamount, so as to denote the intention of the testator, to convey the inheritance to the devisee, he can only take an estate for life. For instance; if a testator, by his will says, I give my lands, or such and such lands, to A, if no words of limitation are added, A has only an estate for life. *Hogan v. Jackson*. *Cowp.* 306. and *Denn v. Gaskin*, *id.* 657. *Right v. Sidebotham*. *Dougl.* 731, 2 & 3.

Where; although the heir at law has only 10s. bequeathed him, the other devisees take only an estate for life, as the estate was not given to somebody else.

If

If one will that his son shall have his land after the death of his wife; here the wife of the devisor shall have the land first for term of life. So, likewise, if a man devise his goods to his wife, and that, after the decease of his wife, his son and heir shall have the house where the goods are; there the son shall not have the house during the life of the wife; for it doth appear that his intent was, that his wife should have the house also for her life, notwithstanding it were not devised to her by express words. *Id.*

Where it is intended a man should have only an estate for life, the usual method, both in deeds and wills, is to convey the estate by the words, *during the term of his natural life*; and then, for preserving contingent remainders, to convey or devise the same to trustees; for, with respect to devises, though an express estate for life is given to the ancestor, with a limitation to the heir or heirs of his body, or his issue, yet regularly the ancestor takes an estate tail. 1 *Co. Re.* 99.

And if a devise be to one for life, and afterwards a limitation, either immediate or mediate, to the heirs of his body, the devisee takes an estate tail.* *Bur. Mansf.* 1631.

Generally speaking, no common person has the smallest idea of any difference between giving a person a horse, or a quantity of land; but the distinction, which is now clearly established, is this: *If the words of the testator denote only a description of the specific estate or lands devised, in that case, if no words of limitation are added, the devisee has only an estate for life.* But if the words denote the quantum of interest, or property, that the testator has in the lands devised; there the whole extent of such his interest passes by the gift of the devisee. The question is therefore always a question of construction upon the words and terms used by the testator. *Hogan v. Jackson. Cowp.* 306.

One gives the fee-simple of his bigger house to A, and after A's decease to B, the son of A. this passes only a life estate to A. *Doug.* 309.

In general, if an estate is given indefinitely, without words of limitation, an interest for life passes. *Doug.* 727. *Note.*

In case my daughter dies before she attains the age of 21 years, and have no issue, then my will is, that my nephew I. H. shall have my said lands and tenements. I. H. takes only an estate for life. 2 *Wils.* 80.

8. March 2, 1738. *Owen and Owen.* The testatrix devised the residue of her personal estate to her 2 nieces, *equally to be divided between them*, and appointed them executrixes accordingly. One of the nieces died in the life of the testatrix. The question was, whether a moiety of the residue should go to the next of kin, as undisposed of by the will; or the devise to the 2 nieces was a joint-tenancy, and the whole residue should go to the surviving niece. By the lord chancellor Hardwicke: It is clear to me, that if both of the nieces had been living, the words *equally to be divided*, would have made a tenancy in common, and not a joint-tenancy; for though these words, in a strict settlement at common law, have never been determined barely of themselves, to make a tenancy in common, yet in a will it is settled that these words will make a tenancy in common, both with regard to real and personal estate. 1 *Atk.* 494.

In

* In this country A CONDITIONAL ESTATE, as mentioned before.

In the case of *Rigden and Valier*, March 25, 1751. The question arose on a deed poll, which began in this manner, "To all christian people, &c. I *George Everinden*, in consideration of natural love and affection, &c. and for the firm settling and assuring of all my real and personal estate on my wife and children after my decease, dispose thereof in the manner following; I give, grant, and confirm, to my daughter *Margaret*, &c [This was not in question.] Also, I give, grant, and confirm, to my two daughters *Margaret* and *Hannah*, the rents and profits of the land called *W.* during the life of my wife, equally to be divided betwixt my said daughters, paying to my wife — per annum; and after her decease to them and their heirs, *equally to be divided betwixt them.* Also I give, grant, and confirm, to my 5 daughters all my personal estate, equally to be divided betwixt them, after all my debts and funeral charges paid and satisfied." This deed was signed and sealed by *George Everinden* in the presence of 3 witnesses. He and his wife died. *Hannah*, one of the daughters, married *Rigden*, by whom she had the plaintiffs, and died. The question was, whether *Margaret* and *Hannah* took as joint-tenants, or as tenants in common. If the latter, the plaintiffs, who brought their bill for an account of the rents and profits of a moiety of the estate given to *Margaret* and their mother *Hannah*, and claimed as co-heirs of *Hannah*, were right: If the former, the whole survived to the defendant *Margaret*, as the survivor of her sister.—By the lord chancellor *Hardwicke*: This case depends upon a deed or writing, which, though executed as a deed, I am not sure was intended to take effect as such. It begins as a deed poll; but it is a disposition of the whole real and personal estate of *Everinden*, and to take place from his decease, and in consideration of the natural love and affection he bore to his wife and children. If it be not construed as a will, or covenant to stand seised, (and being in consideration of natural love and affection, though by a single deed without livery, it may be considered to be a covenant to stand seised), it will be void, being without livery; and because a freehold cannot pass *in futuro*. But by way of covenant to stand seised, it may be good; for that operates not by transmutation of the possession, but the use remains in the grantor till taken out of him by force of the consideration. The present question arises upon a very litigated point in the books, though clear enough in one view. In a will, the words *equally to be divided* certainly create a tenancy in common, though this at first was doubted; nay, the words *equally*, or *share and share alike*, have the same effect. But it is said, that there is not sufficient authority to establish these words to make a tenancy in common in a deed, and that the books take the law to be otherwise. 'Tis true, the books do so generally. And yet there is no solemn determination that I can find, where it has been adjudged against a title, that the words *equally to be divided* will not create a tenancy in common in a deed. The only determination that hath been, was in the case of *Fisher and Wig* (L. Raym. 623. 1 P. Will. 14.) which hath been relied on as a judgment of the court of king's bench, that these words make tenancy in common in a deed. But it is objected, that this is a case of doubtful authority, being on the opinion

nion of only two judges, against so great a man as lord chief justice *Holt*; and it is apprehended too, that this judgment was afterwards reversed. I have made inquiry, and cannot find that it was, or that even a writ of error was brought: so that this judgment yet stands, and is so far an authority, that this construction in regard to the words *equally to be divided* making a tenancy in common, took place in the case of the surrender of the copyhold lands.—Another case has been cited at the bar, which, if rightly reported, is in point. 2 *Vent.* 361. But I have caused the register's books to be searched, and can find no decree to warrant the report: but notwithstanding this, there might have been such a case, and it is taken by *Gould* that there was.—Another case is mentioned at the end of *Fisher* and *Wig*, by *Northey*; but the records have been searched, and there is no possibility of finding it.—*Smith* and *Johnson* too is another authority, such as it is.—In regard to the case before me, upon the best consideration I can give it, I am inclined to be of opinion, that the deed, or instrument, call it what you will, has created a tenancy in common; and, that to say otherwise would be a manifest contradiction to the intention of a father providing for his children. Though none has a greater reverence for the opinion of lord chief justice *Holt* than I have, I think the arguments of the other judges are founded more on the reason and nature of the thing than his lordship's; and that his proceed from the artificial and refined reasoning of the law, and are deduced from a great deal of fine learning drawn from argument in other cases. The arguments of Mr. justice *Gould* have great weight, and are by no means satisfactorily answered. Indeed, that case was on a surrender of copyhold lands in the lord's court; and the two judges argued it was not to be considered with great strictness, but as a will: whereas *Holt* contended that it should be construed as a deed; and in one thing he is certainly right, that the surrender of copyhold lands to uses is not to be considered on the foot of uses, being not within the statute of uses; and therefore such a surrender is only a direction of the lord whom to admit; and when admitted, the surrenderee is not in by the grant of the lord, but by the surrender. If the arguments of the judges had any weight in that case, they must have full as much in this, being on a covenant to stand-seised. But it is objected, that there is no warrant to construe a deed to uses, as to the limitations and words of it, with greater latitude than a conveyance by way of feoffment, or any other conveyance at common law; and that strange confusion would arise, if the words of a deed on the statute of uses should be taken in a larger sense than they would bear in a conveyance at common law. This is true in general: for the statute joining the estate to the use, it becomes one entire conveyance by force of the statute. But some restriction must be added to this. The words of limitation, to be sure, must be construed in the same sense as at common law. But when there are words of regulation or modification of the estate (as the words *equally to be divided* are,) and not words of limitation; I think there is no more harm in giving them a greater latitude in deeds on the statute of uses, which are trusts at common law, than in feoffments, which at all times have been strict conveyances. The case upon that occasion, cited by
Gould,

Gould, is very material; where the intendment, not the words, of the special verdict influenced the determination. Consider the argument from thence to the present case. The only distinction taken between the construction of words in a special verdict and in other cases, is, that in a special verdict they may be taken more largely than in pleading; and therefore, it is often said, that a description, which would be bad in a count or plea, may be good in a verdict, and taken by the intendment of the jury: but there never was any book that said, that words may be taken more loosely in a special verdict than in a deed. It is admitted, that if the deed had been in this manner to hold one moiety to one and her heirs, and the other moiety to the other and her heirs, this had been good, not only in such a deed as this, but likewise in a feoffment. And considering how the sense of the words *equally to be divided* is to be construed, there is no reasonable difference between the two cases. Thus the matter stands on the foot and authority of *Fisher* and *Wig*.—But there are other reasons which greatly strengthen the present case in favour of the plaintiffs. The first is this: Here is a parent making a provision for his children (who were five in number,) and for his wife: if the children were to take this estate, intended for the support of each of them and their future families, as joint-tenants; the share of any one, who should happen to die, would not descend for the maintenance of his children and posterity, but survive to the other joint-tenants: a disposition by no means reasonable, nor likely to be supposed agreeable to the intention of the father. And this court has always used a great latitude in pursuing the intent of the parties, in construing a deed to make a tenancy in common or a joint-tenancy, though the words *equally to be divided* have been omitted; and have determined therefore, that if two men jointly and equally advance a sum of money on a mortgage in fee, and take a security to them and their heirs, there shall be no survivorship; and so, if they foreclose an estate, it shall be divided betwixt them, because their intention is supposed to be so. It has been said indeed, if two men make a purchase, they may be supposed to buy a kind of chance between them, and to intend that the survivor shall be entitled to the whole. But it has been determined, that if two purchase, and one advance more than the other, there shall be no survivorship, though there be no such words as *equally to be divided*, or to hold as tenants in common: which shews how strongly the courts have leaned against survivorship, and erected a tenancy in common, by construction, or the intention of the parties. Consider how nearly this comes to the case in question. And this court always considers provisions for children as having an equitable consideration. And, therefore, though such voluntary dispositions cannot be preferred to debts for valuable consideration, yet they are always preferred to other voluntary dispositions.—But *Geo. Everinden* has himself put his own construction on the words, by the disposition of his *personal* estate; which is allowed to make a tenancy in common.—Besides, this appears to be as near a testamentary act as possible; nor do I know why it may not be proved as a will, notwithstanding the solemnity of the execution by sealing and delivery: according to the case of *Kibbet* and *Lee*, (*Hob.* 313.) and
a late

a late determination in the king's bench, in the case of *Trimmer and Jackson*. And it is admitted, that, in a will, these words make a tenancy in common; and I think it ought to be so here. My opinion, therefore, at present, is, that, agreeable to the case of *Fisher and Wig*, strengthened by the farther observations already made, the plaintiffs are entitled to a division of the estate. *2 Vez. 252.*

So in the case of *Goodtitle and Stoakes*, in the king's bench: *H. 26 G. 2.* By indentures of lease and release, dated in the year 1695, and made between *John Gurl* and his wife of the one part, and *William Purefoy* and *Peter Capper* of the other part, the said *John Gurl* granted and released to the said *Purefoy* and *Capper* and their heirs, the lands in question, to the use of such and so many of the children of the said *Gurl*, on the body of his said wife begotten, in such manner, and in such shares, as the said *John Gurl* should appoint; and in default of such appointment, *to the use of all such children equally to be divided*; with a remainder to the right heirs of the said *John Gurl*.—*John Gurl* died, without making any appointment, leaving his widow, and children, *Richard, Jane, Peter, and Wilmot*.—The question was, whether by the words "*to the use of all such children equally to be divided*," the children took as tenants in common, or as joint-tenants, in which case *Wilmot*, who married the defendant, being the only surviving child, would take the whole.—*Lee ch. j.* delivered the opinion of the court: This case depends upon the clause (above-mentioned). The defendants have insisted, they ought to take as joint-tenants. Joint-tenants must be to the land in one right, and by one joint title, and they must have one joint freehold. Tenants in common take differently, as is laid down, *1 Inst. sect. 292, 296, 297*: from which it does appear, that no particular words are necessary to create a tenancy in common. The question then comes to this: Whether the children do not take several freeholds, with a several occupation? To make them tenants in common, would be to construe every word in this deed as operative. No words in a devise or a grant shall be construed void, if they can be construed otherwise consistently. (*3 Lev. 373*). There is no doubt at this time of day, but that the words *equally to be divided*, in a will, make a tenancy in common. In the case *Cro. Eliz. 443, 695*, it was first determined to be so. There is no determination where in a deed to uses they will. It has been objected, they have a joint-title in the freehold; and the words *equally to be divided* will not sever it: And though the statute of uses executes the use to the possession, yet it leaves the estate subject to the same uses: The intent cannot prevail here; and these words, in a conveyance at common law, would not create a tenancy in common. But the question here is not, whether the joint-title is severed, but whether any joint-title is conveyed. If land be given to *A* and *B*, to hold one moiety to *A*, and his heirs, and the other moiety to *B*, and his heirs; they take as tenants in common. And where the grantor, in the same clause, and *uno flatu*, uses the words *equally to be divided*, he intends to convey an equal property in the land, and to the fee, to each. This is the opinion of *Popham, Cro. Eliz. 696.* in his argument. I cannot think the clause here is nugatory, or of no effect. The intent of the party operates to pass the

the whole fee. There is no rule in law, to prevent the court from making a construction, according to the intent of the party, in a deed. The true reason why the words *equally to be divided* make a tenancy in common, is from the apparent intent that the estate should be divided: And such a construction ought to be made, if there be no rule to the contrary; and no precise words are necessary. The case in 2 *Ventr.* 365. is in point: A covenant to stand seised to the use of A, for life; and after, to two, equally to be divided. 1 *Inst.* 191. a. If a verdict find that a man hath two parts of a manor, or the like, to be divided into three parts, they are tenants in common, by the intendment of the verdict; and if in a verdict, there is no reason why not in a deed. *Carth.* 343. *Leigh v. Brace.* A conveyance by way of use shall be construed as a will, with respect to the intention of the parties. The case of *Fisher and Wig* cannot now be departed from: It is mentioned in the case of *Phillips and Stringer*, as if this judgment had been reversed; but it was not. The whole reasoning of *Holt's* argument, in the said case of *Fisher and Wig*, is applied to the supposition of a conveyance at common law: but it does not from that appear, what his opinion would have been, upon a direct deed to uses as here. In the case of *Rigden and Valier*, lord *Hardwicke*, ch. j. declared, upon the best consideration he could give the case, that he was inclined to think that the words *equally to be divided*, whether in a will or deed, create a tenancy in common. And judgment was given for the plaintiff by the whole court.

In the case of *Peat and Chapman*, August 3, 1750: The testator devised all the rest and residue to be divided betwixt two. By Sir John Strange, master of the rolls: This must be understood to be *equally* divided, and is a tenancy in common; and by the death of one in the life of the testator, his moiety shall not survive to the other devisee of the residue, but be considered as undisposed of by the will, and divided among the next of kin, as if no devise thereof had been. 1 *Vez.* 542.

And in the case of *Denn v. Gaskin*, it was adjudged, that *equally*, as well as *equally to be divided*, implies a division and tenancy in common. *Cowp.* 660.

A devise to the testator's eldest son, of £ 200. also to his 3 younger sons, G, W, and G, and their heirs, a house and close, as *tenants in common when they come at the age of 21 years*; also to his wife a house, and, after her decease, the same to go to his 3 daughters and their heirs for ever: and his will further was, that if any of his above-named children should happen to die before they came of age, and without issue, then their property and share in any of the above bequeathed premises to be *equally divided* amongst the rest of his surviving children, share and share alike. The eldest son was of age at the date of the will: two of the younger sons died under age. The court determined that the eldest son and the 3 daughters are *equally* entitled with the younger son to the shares of the deceased brothers. *Denn v. Balderston.* *Cowp.* 257.

Devise to trustees in trust for the use of the heirs male of J. A. and in default of such issue to the use of the heirs male of R. A. and in default of such issue male, to the use of all and every the grand children of

of J. A. and S. M. as tenants in common. A codicil (bearing the same date as the will) directs trustees to pay the interest and produce of his real and personal estate to the testator's wife S. A. and to the said J. A. and R. A. during their lives, with survivorship. Eight grand-children of J. A. and S. M. were alive at the date of the will; a ninth was born before the testator died; twelve more were born after his decease, and all in the life-time of R. A. who, as well as the devisee J. A. died without issue. *It was adjudged*, that, as the 21 grand-children were all alive at the death of R. A. all were equally entitled. *Baldwin v. Karver. Cowh. 309.*

Where one devises to *children*; if it be an *immediate* devise, there it shall only be intended to relate to children *in esse* at the time. There is a material distinction between this sort of bequest and a provision for children in marriage-settlements; because, in them, as there are no children *in esse* at the marriage, and the number is uncertain, it must be supposed the benefit was intended equally for all. But if, in a will, a devise is limited to children by way of remainder, or upon a contingency which, in the contemplation of the testator, is uncertain when it may take place, if it ever happens at all; there the same reason holds, why it should not be confined to those only who were alive at the time of making the will. *Id. 314.*

One devises to his sons J. M. and R. M. all his lands and tenements, freely to be enjoyed and possessed "*alike*." It was adjudged, that J. M. and R. M. are tenants in common, and take a fee; and that "*alike*" imports equally to be divided. *Loveacres v. Blight. Id. 352.*

9. A devise of all a man's goods and mortgages to his executors, is a good devise; and will pass all the lands mortgaged; for the equity of redemption passeth to the devisee. *God. O. L. 477. Cro. Car. 37.*

But by a general devise of all lands, tenements, and hereditaments, a mortgage in fee shall not pass, unless the equity of redemption be foreclosed; and if after such devise made, a foreclosure is had, yet such estate shall not pass by those general words of lands, tenements, and hereditaments, because a foreclosure is considered as a new purchase of the land. The interest of the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagor. If a man devises his estate, and after makes a mortgage in fee, it is a total revocation in law, yet in equity it is a revocation only *pro tanto*. And the mortgagee, with regard to the inheritance, is a trustee for the mortgagor, till a foreclosure. *1 Atk. 605. 2 Bac. Abr. 83.*

10. Fee farm rents, or any other right out of lands, will pass by a devise of lands. *Viner. Devise. K.*

11. Where lands are appointed to be sold, and it is not said by whom, the executor ought to sell, because he is the person intrusted with the execution of the will. *Law of Test. 121. Law of Ex. 221.* And a court of equity will compel the heir at law, and all other proper parties, to join in the sale. *1 Atk. 490.*

Whereas doubts have arisen respecting the powers of executors to sell and convey the lands of their testator, where the said testator has directed that the same shall be sold, but has not declared by whom the

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said sale shall be made; *be it enacted*, that wherever any person has directed, or shall direct, by his last will,* duly executed, in the presence of 3 or more credible witnesses, that his lands shall be sold for the payment of his debts, or for the purpose of distributing the money which may arise from the sale thereof, among his legatees: then the executors of such person, or the majority of such as shall qualify on the said will, (if no person is expressly named for that purpose) shall sell and convey the said lands agreeable to the intention of the testator: and if he, or they, should renounce, according to law, then the administrator or administratrix, with the will annexed, shall be authorized, by this act, to sell the real estate of the said deceased, as directed in the will. No. 1470. p. 423, *Pub. Acts.*

H. 26 El. Vincent and Lee. A special verdict was found, that *A* was seised of certain lands in fee, and devised the same in tail; and if the donee died without issue, that his said lands should *be sold by his sons in law*, he in truth having five sons in law: one of his sons in law died in the life of the donee, and after the donee dieth without issue, and then the four of the sons in law sold the land: and it was adjudged, that the sale was good; because they were named generally, by his sons in law, and the lands could not be sold by them all; and the words of the will, in a benign interpretation, are satisfied in the plural number, albeit they had but a bare authority. But if they had been particularly named, it had been otherwise. 1 *Inst.* li 3.

Where lands are devised to be sold by the executors of any testator, and some of the said executors refuse to qualify, such executor as shall qualify may sell the land so devised to be sold. 21 *H. 8. c. 4.* No. 331. *Pub. Acts*, p. 45.

If executors or others who are put in trust, by devise, to sell or the like, will not perform the trust, the heir may enter. *Br. Devise.* 46.

But if a man deviseth lands to his executors to be sold, and maketh 2 executors, and the one dieth; yet the survivor may sell the land, because, as the estate, so the trust shall survive. And so note a diversity between a bare trust, and trust coupled with an interest. 1 *Inst.* li 3.

Yet in neither of those cases, albeit one refuse, can the other make sale.

* This act seems to have been carelessly penned, as the statute of frauds does not require the execution of the will in the presence of the witnesses; but the three requisites are, 1st. "That the will should be in writing: 2dly, that it should be signed by the testator; and, 3dly, that it should be subscribed by 3 witnesses in the presence of the testator: 3 *P. Will.* 254." If it run thus, it would be more legal: "Duly attested in the presence of the testator, by three or more credible witnesses." Indeed, upon comparing the 5th and 6th § of that statute, we find, to make a will legal, the witnesses must sign in the presence of the testator, though it is generally understood, that the testator must sign his will in their presence; but that is not required by the statute. It was as universally understood, that an express written revocation must be executed with the same solemnities as an original will; but in the 6th § of that statute, relative to such revocations, the subscription of the witnesses is not directed; while, on the other hand, the signing by the testator, in their presence, is, in such case, expressly prescribed: but this latter inaccuracy of the statute of frauds has been corrected by the 3d § of No. 1582, *Pub. Acts.* It were also to be wished, that the same alteration should take place in this act of assembly, so as to render them more uniform in their construction and operation.

sale to him that refused; because he is party and privy to the last will, and remaineth executor still. *1 Inst. 113.*

And hereupon lord Coke says, his advice to them that make such devises by will, in order to make it as certain as they can, is, that the sale be made by his executors, or the survivors or survivor of them, if his meaning be so, or by such or so many of them as take upon them the probate of his will, or the like. And it is better to give them an authority than an estate, unless his meaning be they should take the profits of his lands in the mean time, and then it is necessary that he devise, that the mean profits, till the sale, shall be assets in their hands; for otherwise they shall not be so. *1 Inst. 113.*

For where the testator deviseth that his *executors shall sell his land*, there the land descendeth in the mean time to the heir; and until the sale be made, the heir may enter and take the profits. But when the land is devised *to his executor to be sold*, there the devise taketh away the descent, and vesteth the estate of the land in the executor, and he may enter and take the profits, and make sale according to the devise. And in such case, the executor is bound to sell so soon as he can; for that the mean profits taken before the sale, shall not be assets; and therefore he might otherwise take advantages of his own laches. *1 Inst. 236.*

Where there is a devise of lands to trustees to sell, to pay debts, the heir shall have the surplus. *Law of Test. 114.*

For, whatever interest in, or profits out of a real estate, are undisposed of by a testator, the same shall descend to the heir; and he takes them, not by the will, or the intent of the testator, but they are cast upon him by the law, for want of some other person to take. *Cas. Talb. 44.*

Thus, the testator, by will, devised all his lands to trustees to sell, and dispose of the money, as he by writing should appoint; and for want of such appointment, to his four nephews. The testator, by writing, appoints his trustees to pay several sums, to several persons, but not to near the value of the land. It was held, that the nephews should not have the residue, but that the heir at law should have it as an interest resulting, and not disposed of. *City of London and Garway. 2 Vern. 571.*

A person devised his real estate to his executors, to be sold for payment of debts; the surplus, if any be, to be deemed personal estate, and to go to his executors, to whom he gave £20. *a piece.* It was decreed, that the surplus should be a trust for the heir at law: And the same was afterwards affirmed in parliament. *Countess of Bristol and Hungerford. 2 Vern. 645.*

The testator devised to his nephew several lands, to hold to him and his heirs for ever, in trust, to be sold for payment of all his debts and legacies, within a year after his death, and made him executor, but gave him *no legacy.* It was held, that there was no resulting trust for the heir at law; for then the executor, who is taken notice of as his nephew, would have nothing for his trouble. *Cunningham and Mellish. Prec. Ch. 31. 2 Vern. 247.*

If lands be devised *for payment of debts*, the executor may sell, though

though authority be not especially given him: but otherwise, if such devise had been for *legacies* only, or for raising portions, or the like; for in such case there had been no remedy but in chancery, against the heir. 1 *Keb.* 14.

If lands be devised in trust, *out of the rents and profits* to pay debts and legacies; if the rents and profits will not raise it in a convenient time, the trustees may sell: for the words [*profits of lands,*] especially when to pay debts or portions, imply any profits that the land will yield, either by selling or mortgaging. 1 *P. Will.* 415.

If lands be devised to be sold for payment of portions, and one of the children dies after the portion is due, and before the lands sold, the administrator of the child is entitled to the money. 1 *Vern.* 276.

For lands devised to be sold, or in trustees hands, for payment of debts, portions or the like, are to be deemed as money, so far as there are any such to be paid; and so, money devised to buy lands, is to be deemed as lands. But, with respect to the heir at law, or residuary legatee, the lands so given in trust, or devised for payment of debts or legacies, shall be deemed as land; and he may, by paying the debts or legacies, pray a conveyance. 9 *Mod.* 170.

One devises certain lands to trustees, in case his personal estate shall not be sufficient for the payment of debts, &c. in aid of it, and all the rest, residue, and remainder of his real and personal estate to his wife. The personal estate proved sufficient—the lands devised in aid pass to the wife by the residuary clause. So, if the personal estate had proved deficient in part only, the wife would have been entitled to the remainder. *Goodtitle v. Knott. Cowp.* 45.

A devisee of the surplus, arising from the sale of land, after payment of debts and legacies, has an equitable interest in the land, and may keep the land, paying the debts and legacies. *Doug.* 740.

So, if money be devised to be laid out in land, and settled on a man and his heirs, he may come into court, and pray to have the money; and that no purchase may be made; for no other has any interest in it. But if he die before it is paid; or laid out in land, and the question is, between the heir and executor, who shall have it, the heir shall have it, and it shall be considered as land; first, because the heir in all cases is favoured; and, secondly, if the executor should have it, it would be against the words of the will, which gave it to the heir. *Precc. Cha.* 544.

12. In wills, "*conditional limitations,*" are all either "*contingent remainders or executory devises.*" *Doug.* 727. *Note.*

Contingent or executory remainders (whereby no present interest passes) are, where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined, and the remainder never take effect. 2 *Black. Com.* 169.

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the deviser, but only on some future contingency. *Id.*

Or, where a deviser devises his whole estate in fee, but limits a remainder thereon, to commence on a future contingency. *Id.*

Favour is shewn, with respect to wills, in that what the law calls executory

executory devises, which is the limitation of a future interest, not to take place immediately on the death of the testator, but at a time, and under circumstances, appointed by the will; as when a man devises a future estate to arise upon a contingency, and till that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heir at law. *Lovelass, 149.*

Executory devises are contrary to the strict rules of law, and were at first invented in furtherance of justice, and to carry into execution the manifest intencion of the testators. *2 Wils. 90.*

But an executory devise seldom or ever happens when the will is made with good advice and due consideration. *Lovelass, 149.*

In all cases of executory devises the estates descend until the contingencies happen. *4 Burn. 139.*

Wherever there is a previous freehold, sufficient to support the limitations over, as remainders, they shall never be construed to be executory devises. *Doug. 252, 729.*

An event, subsequent to the execution of a will, and before the consummation of it by the death of the testator, may make a limitation an executory devise, which, on another event, would have been a remainder. *Doug. 326.*

An executory devise, upon the vesting of a prior executory devise in possession, may become a remainder. *Doug. 470.*

The rule is unquestionable, that there cannot be an executory devise after an indefinite failure of issue. *Doug. 490.*

An executory devise, in fee, is like a contingent remainder, and transferable to the heir of the executory devisee, who dies before the contingency (upon which it depends) doth happen. *2 Wils. 29.*

Estates limited over, after other preceding limitations, may be divided into the three following classes:

1. Such as can take place *in the alternative only.*
2. Such as can take place *in succession only.*
3. Such as may take place, either *in the alternative, or in succession.*
 1. Of the first class are all those, where, if the *first* estate ever vest, they cannot; so that they are only good upon the alternative of the first never taking effect.
 2. The second class consists of those which can never vest, unless the preceding estate take place before them, and then not till the other is either spent, or otherwise determined. These are, however, very rare; and they are often said to be expectant on the first estate.
 3. All other limitations, after previous estates, belong to the third class; and, in all of them, as in all of the first, there is a double contingency. If the previous estate take effect, these await its determination, and then vest in possession: if the other contingency happen, that is, if the first estate never vest, they take place immediately at the time when the first ought to have vested. *Doug. 487—8. Notes.*

In by far the most usual sorts of future limitations, there is a *double contingency*. Thus, suppose an estate is limited to A, for life; remainder to B, in tail; remainder to C: here the time when C's estate shall vest in possession, depends on a *double contingency*. 1. If B die without issue, before A, it will vest immediately on the death of A. 2. If B out-

out-live A, it cannot vest till after the estate tail in B is at an end. *Doug. 487. Notes.*

It is a general rule, where there is a remainder or conditional limitation over, that, if the precedent limitation, *by what means soever*, is out of the case, the subsequent limitation takes place. *Doug. 487. Notes.*

Devise of a rent charge to his younger son, *towards the education and bringing him up in learning*; it is not conditional, and he shall have the rent, though not brought up in learning; and the words, *towards his education*, are only to shew the intent and consideration of the payment of the sum. *2 Lev. 154.*

Devise, if my son and my two daughters die without issue of their bodies, then all my lands shall remain and come to my nephew and his heirs. Here no estate is devised to the son and daughters by implication; the words only import a designation or appointment of the time when the land shall come to the nephew, namely, when the son and two daughters shall happen to die without issue, and not before. For no estate being created to the son and daughters, the nephew can take nothing by way of remainder; for that must descend to the heir at law. A remainder cannot depend upon an absolute fee-simple, that being but the residue of an estate. For when all a man has of an estate, or any thing else, is given or gone away, nothing remains, and no other or further estate can be given or disposed, and therefore no remainder can be of an absolute fee-simple. Yet, in another respect, an estate in fee may be devised to one, and to be in another upon a contingency, as default of paying a sum, or such a one's dying without issue, living the other, or such like. *Vaugh. 259, 270.*

A man devised his lands to one, and devised also that the said devisee should pay a rent to A, and that A might distrain for it; and if the devisee fail of the payment of the rent, that the heirs of the devisor might enter. This is a good distress, and a good condition. *1 Lev. 269.*

Devise to his wife; proviso, and my will is, that she shall keep my house in good repair: This is a good condition. So a devise of lands to one, paying £10. to another, is a good condition. *1 Lev. 174.*

Devise of £100. to his wife, for and in discharge of her dower, is a condition, that she shall not have the £100. till she make a discharge of her dower. *Cro. Eliz. 274.*

If a man deviseth land to an executor to be sold, this amounts to a condition. *1 Inst. 236.*

The mortgagee, by will, remits part of the mortgage money, and all the interest, *if the rest be paid* within three years. If the mortgagor doth not pay within three years, he loses the benefit of the bequest. *1 Cha. Ca. 51*

Testator devises, that, if he dies before he returns from Ireland, his estate shall be sold, &c. He does return, and dies; and this will is found in his keeping at his death: it was only a contingent devise, and shall not take effect. *1 Wils. 243.*

If lands are devised in fee, upon condition that the devisee shall *not* alien; this condition is void: And so it is of a feoffment, grant, release, confirmation, or any other conveyance whereby a fee-simple doth pass. For it is absurd and repugnant to reason, that he who hath no possibility

possibility to have the land revert to him, should restrain his feoffee in fee-simple, of all his power to alien. And so it is, if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition, that the donee or vendee shall *not* alien the same; this is void: because his whole interest and property is out of him, so as he hath no possibility of a reverter: and if such condition should be good, it would oust him of all the power which the law gives him, which would be against reason, and therefore such a condition is void. *1 Inst.* 223.

When the devise is to an infant, *when* he shall be born; or to a daughter, *when* she shall be married; it shall descend to the heir in the mean time. *1 Sid.* 153.

Here is in effect a contingent remainder, without any particular estate to support it: a freehold commencing *in futuro*. This limitation, though void in a deed, yet is good in a will, by way of executory devise. *Black. Com.* 2 vol. 172.

The testator, having the reversion of lands of which another was tenant for life, devised the lands to a man *when* he should marry his daughter. The tenant for life dies. The lands shall descend, until the devisee shall marry the daughter. *1 Keb.* 802.

If executors or others who are put in trust by devise to sell, or the like, will not perform the trust, the heir may enter. *Br. Devise.* 46.

A devise of lands was made to the eldest daughter, paying £100. to the second daughter, and £100. to the third daughter; and if the eldest daughter did not pay the £100. to the second daughter, by such a day, then the testator devised the land to the second daughter, she paying her sister's portion by a certain day; and if she did not pay, then he devised the land to the third daughter. It was resolved, this was not in the nature of a mortgage, to be redeemable after the time of payment was over; but that the eldest daughter not paying at the time appointed, the second daughter should have the land, and the eldest had no relief. *2 Freem.* 206.

The testator devised lands to one, upon condition to pay £30,000. to his grand-daughter and heir at law, to wit, £1000. a year for the first sixteen years, and £2000. a year after till the whole should be paid: of which £1000. being in arrear, the heir enters. It was resolved by Cowper, lord chancellor, that the devisee of the lands should be relieved upon paying the £1000. with interest; the court declaring, that they would relieve wherever they could give satisfaction or compensation for the breach of the condition. *1 Salk.* 156. *2 Vern.* 594.

Where the devisee, who is to perform the condition, is heir at law, notice of a condition must be given to him; because he having a title by descent, need not take notice of any will, unless it be signified to him: But where the devisee is a stranger, and not heir, he must inform himself of the estate devised to him, and upon what terms, and must take notice of the condition at his peril. *Cart.* 94. *1 Vent.* 200.

Devise of lands to his wife for life, remainder to his second son in fee; provided, if his third son shall, within 3 months after the wife's death, pay £500. to the said second son, his executors or administrators,

tors, then he devised them to the said third son and his heirs; the third son died living the wife; then the wife died. The heir of the said third son may enter upon the lands, upon payment or tender of the £ 500. It is not a condition, but an executory devise. *M. 5 G. Marks and Marks. 10 Mod. 420.*

A testator devises to his wife for 3 years, remainder to his only son for 99 years, remainder to him for other 99 years, if he, and such wife as he shall marry, shall so long live; remainder to the heirs of his son's body, and the heirs of their bodies; remainder over in fee. The devise to the heirs of the son's body is a good executory devise.

1 Wils. 225.

A devise of a real estate to A, after a good executory devise thereof to the heirs male of the body of B, and limited on default of such issue, is a good executory devise, vesting either in possession on the death of B, without leaving issue, or as a remainder on his death, leaving issue.

Doug. 470. Doe v. Fonnereau.

But if there is a devise to A, and the heirs of his body, and *for want of such issue* to B, and A dies before the testator, leaving issue, such issue shall take nothing; and the limitation to B shall not be construed an executory devise, but shall vest in possession as an immediate devise on the testator's death. *Hodgson and Ux v. Ambrose and Al. Doug. 323.*

G. P. being seised, in fee, of freehold lands, and in reversion, in fee, of copyhold lands, expectant on the death of C. P. his mother, on the 26th September, 1750, by his will devised the freehold and copyhold to his son G. P. his heirs and assigns, for ever; but if he happen to die before he attain the age of 21 years, leaving no issue, then he devises the premises to his [the testator's] mother C. P. in fee. The testator died in 1750, leaving issue G. his only son and heir; that C. P. widow and mother of the testator, died Jan. 5, 1754; and that G. the son and heir of the testator, and grandson and next heir to C, died Jan. 6, 1754, before he attained the age of 21, and without issue. P. L. was cousin and heir to G. P. the devisee on the part of his father, and S. S. was sister and next heir of C. P. and cousin and next heir of G. the devisee grandson of the said C. on the part of the said C. This is a good executory devise to C. P. and G. only took a conditional or determinable fee. *2 Wils. 29.*

One devises to his son I. L. all his lands and tenements, for the term of his natural life; and, after his decease, to the heirs male or female of the body of the said I. L. forever; and if his said son should die leaving no lawful issue, then he devises the premises to his daughter E. and her heirs and assigns for ever. I. L. suffered a recovery, and did the proper acts to bar an estate tail. The court were of opinion, that the remainder limited to E. was a contingent, and not a vested remainder; because the remainder, before limited to the heirs male or female lawfully begotten, of the body of I. L. was a good contingent remainder in fee-simple; and a remainder cannot be limited after a contingent remainder in fee: and they also held, that the limitation over to E. could *not* enure by way of *executory devise*, because I. L. whether he was tenant for life, or in tail, at least had a freehold in him sufficient

sufficient to support a contingent remainder; and wherever there is a freehold capable of supporting a contingent remainder, it shall never be construed an executory devise. *Doe v. Holme and Longmire.* 2 *Black. Rep.* 777. 3 *Wil.* 241.

13. Devises, as well as other settlements, which tend to introduce perpetuity, are void; for wills, though favourably expounded, are yet to be construed according to the common rules of the courts at law and equity: Hence it is, that a devise to John and his heirs, the remainder to Thomas and his heirs, is void; for that the law in no case will allow a limitation of a fee-simple upon a fee-simple; because, by a devise to John and his heirs, the deviser hath transferred the whole estate to him, and then the limitation over must be impertinent and void, when the deviser before had given the whole estate. Nor can his devise be good by way of future interest, or a remainder to vest upon a contingency; because no man can say when the heirs of John will fail: and to allow the remainder to Thomas to be good upon such a distant contingency, is to perpetuate the estate in the family of John, to preserve a remainder or interest in Thomas, which probably may never vest. *Gilb.* 116. 2 *Bac. Abr.* 86.

But though the law will not allow a present remainder to be limited upon a fee, yet a future contingent estate may be limited upon a fee, where the contingency upon which it is to vest, is to happen in a short time: And therefore, if a devise be made to John and his heirs, and if he die without issue, living Thomas, then to Thomas and his heirs; there nothing vests immediately in Thomas, because the whole estate is transferred to John; yet the limitation is good by way of executory interest or devise; because it is to vest on a contingency which is to happen on a life in being, therefore, out of the inconvenience or danger of a perpetuity; because John is only tied up from alienating but for life, and his heirs are at liberty to dispose of it after the death of Thomas. *Gilb.* 116.

The utmost length that has hitherto been allowed for the contingency of an executory devise to happen in, is that of a life or lives in being, and 1 and 20 years afterwards. As when lands are devised to such unborn son of a feme-covert, as shall first attain the age of 21, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother, and the subsequent infancy of her son: and this hath been decreed to be a good executory devise. 2 *Black.* 174.

Where a devise was made to the Draper's Company, and their successors, in trust, to convey the estates to the deviser's grand-son for life, and then to his son for life; and so on to the first son of that first son, &c. with remainders over, to about 50 persons, for their lives successively, and their respective sons, when born, for their lives, without giving any estate in tail to any of them, or making any disposition of the fee; lord Cowper held this attempt to make a perpetual succession of estates for life, was vain and impracticable. 1 *P. W.* 333. *Note.* 1, 4 *edit.*

If a man devise a *personal* chattel to one, the remainder of it to another, the first devisee hath the whole property, and may dispose of it

as he pleaseth: for such chattels will bear no limitation over, because, being commonly moveable things, they are subject to be broken, worn out, or lost, in the compass of a life; and therefore it were ridiculous to suffer a limitation, which the nature of the thing will not bear. *Gilb.*

117.

But otherwise, it is of a *real* chattel, as of an use: It was indeed formerly held, that such limitations of remainders of terms are void: But, at length, the court of chancery interposed, to rectify the rigour of the common law, and hath settled such remainders of terms to be good, where the settlement doth not tend to introduce perpetuity. *Gilb.* 118.

Therefore, if a term be devised to John, and the heirs male of his body, provided, if John dies without issue in the life of Thomas, then the term to go to another; this last limitation is good, because there is no danger of a perpetuity, for the contingency on which it is to vest is to happen within a life in being. *Gilb.* 118.

But if the limitation had been to John in tail, and the remainder over to another; here the last limitation had been void, because the whole property of the term being in John, the limitation over, which is to vest on the contingency of John's dying without issue, is too distant to expect: whereas, in the former case, the limitation after the intail to John is good, by way of future interest, or executory devise, because it is to vest in the compass of a life, or not at all; and it doth not look like a perpetuity, to oblige John from alienating, because the estate will be free from the clog when the life is spent; and whoever is proprietor afterwards, may dispose of it at pleasure. *Gilb.* 119.

When a remainder is limited after a remainder in fee, both must be contingent. *Doug.* 728.

E. 1731. Fereyes and Robertson. A man, by his will, deviseth his leasehold estate, and other his chattels real, to his son William, and to the issue of his body; and if he die without issue, to his son *B*, and the issue of his body; and if he die without issue, to *C*, and so on. By the whole court: The whole interest vests in William, and shall go to his executors or administrators, and the limitations over are void. *Bunb.* 301.

But a lease assigned in trust for *A* for life, remainder to *B* for life, with remainder to twenty other persons, all in being at the time, is good; because they are like candles all lighted at a time, and have an easy common probability of determination. *Law of Test.* 99.

So to *A* for life, remainder to his first issue for life, is good; because no vast uncertain distance of time. *Law of Test.* 99.

In general, it seemeth to be agreed, that where the devisee or grantee of a leasehold would be tenant in tail in case of a freehold, he shall have the whole interest in the leasehold, and all limitations over are void; but where he would be only tenant for life in case of a freehold, the limitation of the leasehold over will be good.

Money cannot be devised from one to another: as for instance; the testator had three daughters, to whom he devised £540. equally to be divided; and if any of them died without issue, her part to go to the survivor: one of them married and died without issue; the husband exhibited a bill against the executor and the surviving sisters, for his wife's

wife's part, being £180. and had a decree: because a sum of money cannot be intailed. 2 *Ventr.* 349.

So in the case of *Butterfield* and *Butterfield*, Oct. 29, 1748; where money was devised to one for life, and the heirs of his body; and if he died without heirs of his body, then to go over: it was held, that the whole property vested in the first taker, the limitation being too remote. And it was said to be an established rule, that where personal estate is given for life, and then to the indefinite heirs of the body, there being no recovery by which the intail of personal estate can be barred, the first taker may dispose of it as he pleases; and though a personal cannot descend as a real estate, yet, if it was intended to go in that course of descent, which would be an intail of land, the first taker has the absolute property, and the remainder over cannot take effect. 1 *Vezev.* 133.

A conveyance in trust, or a devise of personal property, to one and the heirs of his body, vests the whole interest in him. *Doug.* 488. *Note.*

But the *use* of chattels personal may be bequeathed to one for life; and after, the *property* to another: so that, if one will that *A* shall enjoy the use of his household stuff during his life, and after that it shall remain to *B*; this is a good devise thereof to *B*. But if the *property* of the thing be bequeathed to the first of them, then it is otherwise: for the gift of a chattel personal, though but for an hour, is a gift thereof for ever; provided that the testator make it absolute, and not conditional. *Swin. a.* 207. 1 *P. Will.* 651.

A devise of goods to *A* for life, with remainder, after the decease of *A*, to *B*: it was said to be now clearly settled, that it is a good devise to *B*, and that *B* may exhibit a bill against *A*, to compel him to give security that the goods shall be forthcoming at his decease; and is all one whether the goods or *use* of the goods be devised for life. 2 *Freem.* 206.

M. 1696. *Hyde* and *Parrot*. The testator bequeathed all his household goods to his wife for life, and after, to his son: It is a good devise over, and the same as if the devise had been only of the use of them for her life. And by lord Somers: It is a rule, where personal chattels are devised for a limited time, it shall be intended the use of them only, and not the thing itself. 2 *Vern.* 331.

M. 1702. *Hale* and *Burrodale*. A farmer devised his stock, which consisted of corn, hay, cattle, and the like, to his wife, for life, and after her death, to the plaintiff. It was objected, that no remainder can be limited over of such chattels as these, because the use of them is to spend and consume them. But the master of the rolls said, the devise over was good; but said, if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of sale. And an account was decreed to be taken accordingly. 1 *Abr. Cas. Eq.* 361.

T. 1720. *Urwell* and *Halsey*. The testator, being possessed of a personal estate, of the value of £333. having a wife and sister, but no issue, devised, that such part of his estate as his wife should leave of her

her subsistence, should return to his sister, and the heirs of her body, and made his wife executrix. The wife married; and died, living her husband. The master of the rolls said, that it is now established, that *personal things or money may be devised for life, and the remainder over*; and that though it be true, that the wife had a power over the principal sum, provided it had been necessary, yet not otherwise. And he directed, that the master should inquire how much had been applied for the wife's subsistence, and the husband to account for the residue. 1 *P. Will.* 651.

Where a man devises goods, to go as heir-looms with such an estate, so far as by law they may; the court, to the end that the testator's intention may take effect, will decree a conveyance from him to whom they may come as personalty. *Bernard. Cha. Ca.* 54.

Limitations of chattels personal in remainder after a bequest for life, are, in like manner, permitted, though formerly that indulgence was only shewn where merely the use of the goods, and not the goods themselves, was given to the first legatee; the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded; and if a man, either by deed or will, gives or devises his books or furniture to A for life, with remainder, after the death of A, to B, this remainder to B is good. But where an estate tail, in things personal, is given to the first, or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation. 2 *Black. Com.* 398.

The case of *Dott and others v. Wilson*, determined in Charleston, March, 1795, was founded on this doctrine. The jury found a special verdict, as follows; That Sarah Baker (the former proprietor of the negro) did give and bequeath one fourth part of the residue of her personal estate, by her will, dated 20th April, 1770, in these words; "one other fourth part I give the use of to my daughter Sarah Dott, during her life, and at her death to the heirs of her body, to them and to their heirs and assigns for ever; but if she shall leave no heirs of her body, then to be disposed of as she the said S. D. shall think proper." That the said S. D. had, at the time of the will, issue living, and those who now are the plaintiffs are her children. And that the negro was delivered to S. D. after the death of the testatrix, in the lifetime of her husband D. D. as her fourth part. That S. D. after the death of her husband D. D. intermarried with — Simons, who sold the said negro.

The court unanimously gave their opinion, that, as there was a limitation over, *by will*, it must be supported, and that the plaintiffs must recover.

It has been held, that B might exhibit a bill against A, to compel him to give security, that the goods shall be forthcoming at his decease. But, in the case of *Foley v. Barnet*, March, 1783, lord chancellor Thurlow said, that the cases as to tenant for life giving security for goods, have been over-ruled; and the court now demands only an inventory, which is more equal justice; as there ought to be danger, in order to require security. *Bro. Cha. Rep.* 279.

14. A devise to one's children and grand-children generally, refers only

only to such children and grand-children as were living at the time of making the will; but if a devise were to one's children and grand-children living at the time of the death of the testator, a child *in ventre sa mere* might, in such case, be so far regarded, as to be looked upon as living. 1 *P. Will.* 342.

And such child shall have the same share as any child born before the testator's death. *Lovelass*, 157.

For a devise to an infant *in ventre sa mere*, is good; and the freehold shall descend in the mean time. 1 *Roll's Abr.* 609. 1 *Lev.* 135.

But this must be understood with respect to legitimate children, and not of bastards, for a devise to those in the mother's womb, or before born, is void. *Gilb. on Wills*, 161.

So, if a man devises lands to be sold, for the increase of children's portions; a child born since the will shall have a share. 2 *Cha. Rep.* 211.

So, where a man conveyed a term for 500 years, upon trust, to raise £1500. for such child or children as he should have living at his death, and died, leaving no child, but his wife ensient of a daughter, which was after born; it was decreed, that this daughter was a child living at his death, within the meaning of the trust. And the direction of a trust is not so strictly construed as the limitation of an estate at law; and in *Lutterel's case*, in lord *Bridgman's* time, a bill was brought on behalf of an infant *in ventre sa mere*, to stay waste, and an injunction was granted. *Hale and Hale. Prec. Ch.* 50.

And by the 10 and 11 *W. c.* 16. Where any estate shall, by any marriage or other settlement, be limited in remainder to, or to the use of the first, or other son or sons of the body of any person lawfully begotten, with remainder over to the use of any other person; or, in remainder to, or to the use of a daughter lawfully begotten, with remainder over to any other person; any son or daughter of such person lawfully begotten, that shall be born after the decease of his father, may, by virtue of such settlement, take such estate so limited, in the same manner as if born in the life-time of their father; although there shall happen no estate to be limited to trustees, after the decease of the father, to preserve the contingent remainder to such after-born children, until they shall come *in esse*. No. 331, p. 91, *Pub. Acts*.

T. 11 G. 2. * *Jones and Fulham*. The testator, being possessed of a term, devised it in these words: "To my wife for her life; and after her decease, to such child as my said wife is now supposed to be with child, and ensient of, and his heirs for ever: Provided always, that if such child as shall happen to be born as aforesaid, shall die before it has attained the age of 21 years, leaving no issue of its body, then the reversion of one third part to my said wife, and the other two thirds to my sisters." The testator dying within a month after, the wife entered, and enjoyed during her life, but had no child or miscarriage. And upon her death, the question was, Whether, as no child had ever been born, the remainders, limited upon his dying under 21, without issue, could take effect? And after several arguments, it was held by the court of king's bench, that they might; that though formerly there had been opinions to the contrary, yet, according to the law

now

* It is called, in 1 *Wils.* 107, *ANDREWS v. FULHAM*; and see 1 *Wils.* 105.

now settled, the devise to the infant *in ventre sa mere* was well limited, and if any child had been born, would have passed the term accordingly: Secondly, that though no child was ever born, yet the remainders are notwithstanding good; for there being no devisee, the devise, though void only *ex post facto*, falls to the ground as much as if it had been void in its creation, and this lets in the remainders immediately; that though the clause by which the remainders are limited is, in words, strictly speaking, conditional, yet they do not make it a condition, but only a limitation. Lastly, that the contingencies must happen within a reasonable time; and therefore, it may well operate by way of executory devise. And they said they had seen the decretal order in the court of chancery, by which it appeared, that the same question, arising upon this same will, and concerning the same premises, came before lord Harcourt: and that he was of opinion, that the devise over of the reversion in thirds to the wife and two sisters, was good, notwithstanding the wife was not ensient with any child. *Vin. Devise. L. 53.*

A devise to a son, of which the testator supposed his wife to be ensient, when he should be 21 years old; but, if a daughter, then one moiety of his estate to his wife, and the other moiety to his two daughters (there being one at that time) at the age of 21; if either of the daughters die before that time, her share to the survivor; if both die before that time, both their shares to the wife in fee; if she should die, her share to the daughters. The testator died; the wife was not ensient at the time of the will, or at his death. The daughter died under age, and without issue. In such case, the wife shall take the whole estate. *Cowp. 40. Statham v. Bell, and Doug. 65, 66. Notes.*

15. The father settled a lease, with reference to his will; in which he gave £500. to each of his daughters, to be paid at the age of 21; and if any or all died before that age, then to others; but devised no maintenance to them till their portions became payable. By the court: A maintenance cannot be decreed, because of the devise over. *1 Cha. Cas. 249. 3 Salk. 127.*

But if there is no devise over, the court will decree a maintenance in the mean time: Thus, in the case of *Harvey and Harvey, E. 1722.* The father, seised of a real estate, and possessed of a personal estate, and having several children, deviseth all his real and personal estate to his eldest son, charging the same with £1000. apiece to all his younger children, payable at their respective ages of 21; but in the will no notice is taken of maintenance for the younger children in the mean time. The younger children bring their bill, in order to recover interest, or some maintenance during their infancy. Upon which the master of the rolls, having taken time to consider of the case, and having been also attended with precedents, decreed, that the younger children should recover maintenance. He observed, that these being vested legacies, and no devise over, it would be extremely hard that the children should starve, when entitled to so considerable legacies, for the sake of their executors or administrators, who, in case of their deaths, would have the said legacies: That, in this case, the court would do what, in common presumption, the father, if living, would (nay, ought to)

to) have done; which was, to provide necessaries for his children.
2 *P. Will.* 22.

A legatee, who is a *grand-child*, cannot have the interest of a legacy ordered to be paid to her for maintenance; but, in the case of *a father and daughter, and no other provision made for her*, the daughter should have the interest. 1 *Wils.* 161.

16. It is usual in wills to devise all the household stuff; by which words, *plate* about the house, and not for ornament, passeth; but *books, cattle, clothes, coaches, corn, carts, ploughs, waggon, and any thing fixed to the freehold, will not pass by that word.* *Swin. a.* 185.

17. By a devise of household goods, *plate* will pass. 2 *Vern.* 638.
3 *Atkyns*, 370.

T. 1727. Nichols and Osborn. The testatrix devised all her household goods to *J. S.* The question was, Whether, by the devise of the household goods, the *plate* should pass? Though it was reported on a reference to a master, that there were manifest intentions and declarations of the testatrix, that she did not intend the plate should pass; yet the master, certifying that the plate was commonly used in the house, all the evidence touching the intention of the party was rejected, there being a complete and plain will in writing, which must not be altered or influenced by parol proof. 2 *P. Will.* 419.

If a man deviseth £1200. to *J. S.* and, by general words, deviseth all his goods, chattels, and household goods, in and about his house, to the said *J. S.* money in the house will not pass, he having a particular legacy devised to him. *Swin. a.* 185.

By a devise of jewels, plate, pictures, medals, and furniture; it was decreed by lord Hardwicke, that a *library of books* did not pass under the word furniture. 3 *Atk.* 202.

18. It is usual, likewise, to devise all the goods moveable and immoveable. Now, by the civil law, actions, and rights of actions, pass by the word moveables, especially when the words of universality are repeated in the will; as, I give to *T. S.* all my moveable goods, and immoveable, of what kind soever, or wheresoever found. *Swin. a.* 185.

One deviseth all his goods; and whether a debt, by *bond*, passed to the devisee was the question: *Decreed*, by lord chancellor Cowper, that it did; that these words seemed at common law to pass a bond, and to extend to all the personal estate: but this being in the case of a will, and a will relating to a personal estate too, it ought to be construed according to the rules of the civil law: now the civil law makes *bona mobilia* and *bona immobilia* the *membra dividenda* of all estates; *bona immobilia* are land, and *bona mobilia* are all moveables, which must extend to bonds, and therefore, by the devise of all the testator's goods, a bond must pass. 1 *P. Will.* 267.

By a devise of all his goods, a *lease for years* will pass, if there be not some other circumstance to guide the intent of the devisor. *Swin. a.* 200.

But where a man devised to his niece *all his goods, chattels, household stuff, furniture, and other things which then were, or should be in his house at the time of his death*, and died, leaving about £265. in ready money

ney in the house; it was decreed, that this ready money did not pass: for, by the words *other things* shall be intended things of like nature and species with those before mentioned. *M. 1729. Trafford and Beveridge. 1 Abr. Eq. Cas. 201.*

So, where a man devised so much of his *personal estate as should be and remain on such an estate at his death*; and there were, amongst other things, corn, household goods, plate, and £ 400. in money; it was decreed by the lord chancellor Hardwicke, that all stock on the farm, live and dead, and all stores on the lands, did pass; but that the £ 400. did not pass by the devise. *Inclendon and Northcote, March 2, 1746. 3 Atk. 437.*

So, where a man devised to his wife *all his household goods, and other goods, plate, and stock within doors and without*, and bequeathed the residue of his personal estate to another; it was decreed, that the testator's ready money and bonds did not pass by the word *goods*: for if the words were to be taken in so large a sense, it would make void the bequest of the residuum; and therefore, the words *other goods* should be understood to signify things of the like nature with *household goods*, that the whole will might have its effect. *3 P. Will. 112.*

19. Chattels are of two kinds, real and personal. Real chattels are such as concern or savour of the reality, as terms for years of land, and the like. Chattels personal (which are what are commonly to be understood when goods and chattels are given by will) are properly things moveable, which may be annexed to, or attendant on the *person* of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. *2 Black. Com. 386—7.*

By a devise of *all his chattels*, the devisee shall not have glass of the windows, wainscot, tables dormant, fats in the brew-house fixed to the freehold, nor furnaces, nor the box or chest where the testator's evidences are; nor doves in the dove-house, nor fishes in the pond, nor deer in the park: for these things belong all to the heir. *Curtis 181.*

20. If a man, seised of land for life, or in fee, or in tail, in his wife's right or his own, *sows it with corn*, or any manner of grain, and dies before severance, it shall go to the executor* of the husband, and not to the wife or heir that shall have the land. *Went. 59. Swin. 214. 2 Inst. 81. Hob. 132.*

But where a man was seised of land in fee, and sowed the land, and *devised* the same, and died before severance, it was adjudged, that in this case the devisee should have the corn, and not the executors of the devisor; for the devisee, in relation to the chattels belonging to the land, is put in the place of the executors, by the words of the will. *M. 20 Ja. Spencer's case. Winch. 51. Swin. a. 183.*

And the reason why the corn passeth to the donee as appertaining to the soil when the property of the soil alters, and yet shall not descend to the heir, as appertaining to the soil when the property of the soil remains in the first owner, is this: because every man's donation shall

* Or administrator. Lovelass, 30.

shall be taken most strongly against himself; and therefore it shall pass not only the *land* itself, but the *chattels* that belong to the land. *But no chattels can descend to the heir*, and therefore they go to the executor. *Gilbert's Law of Evid.* 250.

If any person shall die after the 1st of March, in any year, the slaves of which he was possessed, whether held for life or absolutely, and who were employed in making a crop, shall be continued on the lands which were in the occupation of the deceased, until the crop is finished, and then be delivered to those who have the right to them: and such crop shall be assets in the hands of the executors or administrators, subject to debts. *No. 1582, § 23, p. 494, Pub. Acts.*

Emblements on the lands, which shall be severed before the last day of December following, shall, in like manner, be assets in the hands of the executors or administrators: but all such emblements growing on the lands on that day, or at the time of the testator's or intestate's death, if that happens after the said last day of December, and before the 1st day of March, shall pass with the lands. *Id.*

If land be *sold*, the corn growing shall go to the purchaser of the land, unless specially excepted. *Went.* 59.

A person, seised in fee, sows the land, and after grants it to *A* for life, remainder to *B*. *A* enters, and dies before the corn is severed: His executors or administrators shall not have the crop, because he was not at any charge or industry; but *B* shall have it. *Hob.* 132.

Generally, the distinction seemeth to be, where the estate is determined by the act of the party himself, and where it is determined by the act of another.

And, therefore, Littleton saith, if the lessee, being *tenant at will*, sow the land, and the lessor, after it is sown, and before the corn is ripe, put him out; yet the lessee shall have the corn, and shall have free entry, egress, and regrees, to cut and carry away the corn; because he knew not at what time the lessor would enter upon him. Otherwise it is, if *tenant for years*; who knoweth the end of his term, sows the land, and his term ends before the corn is ripe; in this case, the lessor, or he in the reversion, shall have the corn; because the lessee knew the certainty of his term, and when it would end. *Litt.* § 68.

And the reason why the tenant at will shall have the corn is; because his estate is uncertain; and therefore, lest the ground should be unmanured, which would be hurtful to the public; he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is, if he set roots, or sow hemp, or flax, or any other annual profit; if, after the same be planted, the lessor oust the lessee, or if the lessee dieth, yet he, or his executors shall have that year's crop. But if he plant young fruit trees, or young oaks, ashes, elms, or the like, or sow the ground with acorns; there the lessor may put him out notwithstanding; because they will yield no present annual profit.—And this is not only proper to a lessee at will, that, when the lessor determines his will, the lessee shall have the corn sown; but to every particular tenant that hath an estate uncertain. And therefore, if *tenant for life* soweth the ground, and dieth,

his executors * shall have the corn: for that his estate was uncertain, and determined by the act of God.—And the same law is of the *lessee for years of tenant for life*.—So, if a man be seised of land *in the right of his wife*, and soweth the ground, and he dieth, his executors * shall have the corn; and if his wife die before him, he shall have the corn.—So, if a woman, seised in fee or for life, sows the land, and then takes a husband, and he dies before the severance, the wife shall have the profits, and not the executors of the husband: for the corn committed to the ground is a chattel real, which is annexed and belonging to the freehold; and not a chattel personal, annexed to the freehold and transferred. And, therefore, if the husband doth not dispose of it during his life, it belongs to the wife, and not to the husband.—So, if the husband sows the land, and dies before severance, the wife shall have the third part of the land so sown for her *dower*: for she shall be in of the best possession of her husband, above the title of the executor; and it would be unreasonable, if her husband had all corn land, that she should stay for her subsistence for a whole year, till the crop should be renewed.—If a man, seised of lands in fee, hath issue a daughter, and dieth, his wife being *ensient* with a son; the daughter soweth the ground; the son is born; yet the daughter shall have the corn, because her estate was lawful, and defeated by the act of God; and it is good for the commonwealth that the ground be sown.—But, if the *lessee at will* sow the ground with corn, and after, he himself determine his will, and refuseth to occupy the ground; in that case the lessor shall have the corn, because he loseth his rent.—And if a woman that holdeth land *during her widowhood*, soweth the ground, and taketh husband; the lessor shall have the corn, because the determination of her own estate grew by her own act.—But where the estate of the lessee being uncertain, is defeasible by a title paramount; or if the lease determine by the act of the lessee, as by forfeiture, condition, or the like; there, he that hath the right paramount, or that entereth for any forfeiture, or the like, shall have the corn.—So, if a *disseisor* sow the ground, and sever the corn, and he who is disseised re-enter, he shall have the corn, because he entereth by a former title: and severance, or removing of the corn, altereth not the case: for the regress is a re-continuation of the freehold in him, in judgment of law from the beginning. 1 *Inst.* 55. 2 *Inst.* 81. 1 *Roll's Abr.* 727.

If any person shall rent or hire lands, or slaves, of a tenant for life, and such tenant for life dies, the person hiring such land, or slaves, shall not be dispossessed until the crop of that year is finished; he or she securing the payment of the rent or hire when due. No. 1582, § 23, p. 494, *Pub. Acts.*

21. Generally, by the *ecclesiastical law*, all conditions against the liberty of marriage are unlawful, as being a restraint on the natural liberty of mankind, and an hindrance to the propagation of the species.

So, if the condition be, that the legatee marry according to the appointment, arbitrament, or consent of some other person, this is rejected as unlawful. *Godolphin's Orphan's Legacy*, 45.

But

* Or administrators, *Lovelass*, 30, 31.

But if the conditions are only such as whereby marriage is not absolutely prohibited, but only in part restrained, as in respect of time, place, or person; then such conditions are not absolutely to be rejected. *God. O. L. 45.*

So, if the condition be, not to marry before the age of 20 years, this condition is to be performed; otherwise, if it is continued to an unreasonable length. *Id.*

So, if the condition be, not to marry such a particular person, or a widow, or of one particular place, or the like; this is also to be observed. *Id.*

Generally, in the *temporal* courts, the distinction seemeth to have been, where the legacy is devised over to another, and where it is not devised over: in the former case it hath been held, that the restraint shall be good, so as the legacy shall not be due, unless the condition be performed; but in the latter case, where there is no devise over, it hath been held, that the proviso or condition is only *in terrorem*, to make the person careful, but not to defeat the legacy. *1 Ch. Ca. 22. 1 Vern. 20. 2 Vern. 293, 357.*

Also, in the *temporal* courts, a *distinction* is made where a portion is charged on the personalty, and where it is charged on land. If it is charged on the personalty, they follow the rule of the ecclesiastical court, which hath jurisdiction as to the personalty; but if it is charged on land, of which the ecclesiastical court hath no jurisdiction, they follow the rule of the common law courts, which, on non-performance of the condition, will not suffer the portion to be raised. In the case of *Hervey and Aston*, April 30, 1737; Sir Thomas Aston, by settlement after marriage, created a term in trust, by mortgage, or sale, to raise £2000. for each of his daughter's portions, "provided they marry with their mother's consent; and if either die before marriage, with such consent, her portion to cease, and the premises to be discharged; and if raised, then to be paid to the person to whom the premises should belong;" and afterwards, by will, created another trust term to augment their fortunes £2000. apiece more, but *subject to the condition as in the settlement*; and gave the residue, over and above the £2000. apiece, to his wife; and, by a codicil, created another trust term for the better raising of his daughters portions. Sir Thomas died, leaving 2 daughters. One of them married after the age of 21, the other before the age of 21, and both of them without the consent of their mother. Sir Joseph Jekyl, master of the rolls, decreed the portions to be paid. But on appeal from this decree, the lord chancellor Hardwicke, assisted by the two chief justices Lee and Willes, and the chief baron Comyns, reversed the decree; and argued, 1st, that it is the right and liberty of the subject, who makes a voluntary disposition of his own property, to dispose of it in what manner, and upon what terms and conditions he pleaseth. 2dly, that it is an established maxim of law, that if an estate in land, or interest out of the land, is limited to commence upon a condition precedent; nothing can vest or take effect, till the condition is performed: and this is so strong, and so settled a point, that although the previous act was at first impossible by the act of God, or other accident, the estate can never vest. 3dly, that

that it is most agreeable to the rules of equity, to direct the execution of the trust according to the intent of him who appointed the trust. It is said, that a trust is to be construed favourably: and it is true, it is to be construed with as much advantage as may be to make good, and answer the intent and design of the party; but it is to be construed strictly with regard to the execution of the trust; and therefore, it would be a strange thing, when the trust directs the trustees to pay the money at the time of the daughter's marriage with her mother's consent, that the court should direct them to pay the money before that time. 4thly, that a restraint in the present case is not only lawful, but prudent and reasonable; and no consequence more likely to ensue from it, than the hindrance of an inconsiderate or imprudent marriage. *Comyns* 744. *Cas. Talb.* 212. 1 *Atk.* 361.

T. 1743; *Pulling and Reddy.* By the lord chancellor Hardwicke: If a legacy be given to a woman upon this condition, that she marry with the consent of a third person, and there be no devise over in case she marry without such consent; this is only to be considered *in terrorem*: but, if there be a devise over, then it shall go to whom it is so devised over. This rule is taken from the civil law, as this court hath a concurrent jurisdiction as to legacies. But if a portion be to arise out of land, and there is no devise over; in that case she shall not have it, but it shall go to the heir; for the spiritual court hath no jurisdiction as to lands. There may be some doubt (he said) where money is given to be laid out in lands. 1 *Wilson*, 21.

A legacy is devised to a grand-daughter, to be paid on her marriage; and if she marry without consent, the testator says, "*I hereby revoke what was before directed to be paid her,*" is only *in terrorem*. 1 *Wils.* 135.

A legacy is given to a grand-daughter, in case she marry with consent; she dies without ever having been married; this is a condition precedent, and the marriage must have taken place before the legacy could vest. If the legatee had married without the consent required, this court would have decreed her the legacy, as it was not given over to any other person. 1 *Wils.* 159.

If a legacy be given at 21, or day of marriage with consent, if the legatee live till 21, and afterwards marry without consent; yet the devisee shall have the legacy, though it be given over, if she married without consent. 1 *Wils.* 161.

May 5, 1746. *Reynish and Martin.* Elizabeth Phillips, by her will, devised her real estate to her daughter Martha, and her heirs forever; and then says, "If my daughter Mary marry with the consent of the trustees (therein particularly named) or the major part of them, signified in writing before such marriage had, then, and not otherwise, I give and devise to my said daughter Mary, the sum of £800." And after comes a clause, "And I do hereby charge all my aforesaid real estate, with all my debts of all kind, and with all my legacies." The testatrix died, leaving issue the said two daughters Martha and Mary. Mary married Thomas Reynish, the plaintiff, without the consent of the trustees. And the bill was brought by Thomas Reynish, as representative and administrator of Mary his wife, for an account of

of the personal estate, and that the same might be applied in payment of the said legacy of £800. and in case the personal estate should not be sufficient, that then the real estate, or so much thereof as will make good the deficiency, might be sold, and the money arising therefrom applied for that purpose. This case coming on to be heard at the rolls, the personal estate not being sufficient, Fortescue, master of the rolls, decreed the real estate to be sold for payment of the legacy. The defendants appealed from the decree, and the cause now standing for judgment, lord Hardwicke delivered his opinion to the following effect: 1st, I will consider this as if it had been a mere personal legacy, and payable out of the personal estate. 2dly, I will consider it as if it had been charged on the real estate originally. As to the first, I apprehend, that taking this as a mere personal legacy, the plaintiff, by the rules of the civil and ecclesiastical law, and which have been constantly adhered to in this court, will be entitled to the legacy; for it is an established rule in the civil law, and has long been the doctrine of this court, that where a personal legacy is given to a child on condition of marrying with consent, this is not looked on as a condition annexed to the legacy, but as a declaration of the testator *in terrorem*: And indeed the civil law makes such conditions void, notwithstanding the legacy be given over, but that has not been received so in this court; but whenever the legacy is given over for breach of the condition, the gift over shall take place upon this foundation, because it thereby appears clearly that the person, to whom it was given over, was in the mind and contemplation of the testator at the time of making his will; but in the present case there is no such gift over. The second consideration is, what the consequence will be, taking this legacy as a charge originally laid upon the lands, and not merely personal. In the will it is first of all a personal legacy, issuing out of personal estate; but then the testatrix afterwards, at the close of her will, charges all her real estate with all her debts and legacies. If it had been originally charged upon the land, and given upon the condition before mentioned, it could not have been contended that the plaintiff could have recovered it after breach of the condition; and indeed it would be contrary to the rule of the common law (to decree for the plaintiff) which always favours the heir, and contrary to the determination in *Harvey and Ashton*, for the difference taken there is, that this court follows the rule of the civil law, because that was the original jurisdiction for the recovery of personal legacies; but whenever land is in question, or to be affected, this court followeth the rule of the common law; and in all cases, whereof this court takes cognizance of suit, where the original jurisdiction arises in another court, the rule of this court is always to follow the law of that other court; for if this court did not pursue that rule, there would be different remedies in different courts, which would create great inconvenience, and the rule of right in different courts would be different. But though this be so in the case of a personal legacy, it is not so in regard to lands affected or charged with legacies, because the property of land must be governed by the law of England; and where it is a legacy charged upon land, it must have the same consideration as a devise of the land itself would

would have had. And I am of opinion, if this case stood as an original charge upon land, the plaintiff could have no right to demand it. But this being an original personal legacy, the plaintiff is entitled to have an account of the personal estate of the testatrix, but not of her real estate. But as the personal estate may be exhausted by the payment of debts and legacies, the next question will be, whether this court cannot marshal the assets in such a manner, as to give the plaintiff a remedy out of the real estate: And as the real estate is expressly charged with the payment of all debts and legacies, and this legacy, by the event which has happened, falls out to be a charge upon the personalty only; I am of opinion, that the plaintiff ought to stand in the place of such creditors or legatees as have received a satisfaction out of the personal assets: And to order it so, is the constant rule and practice of this court. 3 *Atk.* 330. 1 *Wilson*, 130. *Bro. Cha. Rep.* 303.

In the case of *Needham and Vernon*, 25 *C. 2.* Lands were devised in trust for raising portions for daughters, payable upon their marriages, with consent of the trustees; but if they married without consent, then to remain over to another. The daughters were old, and never intended to marry, but to lay out their portions in a purchase of annuities for their lives. And it was held that they should have their portions immediately, upon giving security to indemnify against the persons to whom the portions were devised over.—And the like hath been decreed, upon giving security to refund, if the condition should be broken. 1 *Abr. Eq. Cas.* 111.

22. If a legacy be given on condition not to dispute the will, and the legatee commenceth a suit whereby he disputes the validity of the will, yet this is no forfeiture of the legacy, if there was probable cause of contesting it. 3 *Bac. Abr.* 479.

And even although there be no probable cause, yet, where a legatee, or other person interested, hath a right to see the will proved in solemn form, his making use of that right cannot (as it seemeth) be deemed a disturbance.

E. 1724. *Nutt and Burrel*. The testator gives to *B* a legacy, on pain of forfeiture of it, in case he should give his wife (whom he made executrix) any trouble in relation to his estate. *B* brings a bill against the wife, for which there was very little colour, and amongst other things demands his legacy. The chancellor was of opinion, that the suit was very frivolous, but would not declare the legacy forfeited. *Cha. Ca. King*, 1.

But in the case of *Cleaver and Spurling*, *T.* 1729. A person, by his will, gives a legacy to his daughter, provided, that if she or her husband refuse to give a release, or put the executor to any trouble, the same shall go over to her sister's children. The daughter and her husband (being within the custom of the city of London) sue for her orphanage part. Decreed, that the legacy was forfeited; for, however, it might have been construed to be intended only *in terrorem*, yet being devised over, and by that means a right to this legacy being vested in a third person, a court of equity could not divest it or call it back again. 2 *Peere Will.* 528.

H. 1710. *Webb and Webb*. The father gave a legacy of £ 40. to his

his son, upon condition that he should not disturb the trustees. They applied to the court for an execution of the trust, and that he might either join with them in a sale, or lose the legacy. And it was decreed accordingly, by Harcourt, lord chancellor. *1 P. Will. 136.*

23. It is said by some, that if land be devised to one, and after, in the same will, to another, they shall take it as joint-tenants. *Gilb. 159.*

But by lord Coke, the last devise taketh place; the same being for so much a countermand of the former part of the will. And of this opinion was lord Hardwicke in the case of *Ulrich and Litchfield* above mentioned, though (he said) the later opinions have taken it otherwise. *1 Inst. 112. 2 Atk. 372.*

But as to this, it seemeth that no certain rule can be laid down; but the determination will vary according to the particular circumstances in each will. *2 Atk. 374.*

For reconciling repugnant clauses in wills, and where, by the same will, the same thing has been given to two different persons, there has been much litigation, and various have been the determinations of the courts concerning it. *Co. Litt. 112. Note 1. 13 edit.* Yet the rule, "that wills shall be most favourably expounded, and that the testator's intention should, if possible, be pursued, provided that such his intent might stand with the rules of law, and not be repugnant thereto," has always been adhered to. As where two legacies were given to the same person, by the same will; that is, two old South-sea annuities, each of £1000. were given, plainly and simply, to the same person, by the same instrument: it was presumed the testator intended the legatee should have but one, and it was decreed accordingly. *Brown's Cha. Rep. 30.*

But where a legacy of £500. was given by the will, and another of £500. by a codicil added thereto, it being inferred that the testator intended the legatee to have both, the court so determined it. *Id. 389.*

And from these and other determinations of the court, it is observed, that where two legacies of quantity are given simpliciter to the same person, by the same instrument, the presumption shall be against their being intended as cumulative; otherwise, where given by different instruments. Yet, where both legacies are given for the same cause, they shall not be cumulative, whether in the same or different instruments; otherwise, where one is given generally, and the other for an express cause: and that very slight circumstances have been considered as sufficient to shew the testator's intention, either one way or the other. *1 P. Will. 424. Note 1. 4 edit.*

If there be two clauses in a will, so totally repugnant to each other that they cannot stand together, the latter shall be received, and the former rejected: wherein it differs from a deed; for there, of two such repugnant clauses, the former shall stand. Which is owing to the different natures of the two instruments; for the last will and first deed are always most available in law. Yet, in both cases, we should rather attempt to reconcile the repugnant clauses. *Black. Com. 2 vol. 381.*

24. A devise by one joint-tenant of land devisable, which he holdeth in fee at his death, jointly with a stranger, is good. § 2, No 597, p. 139, *Pub. AAs.*

But

But a man cannot bequeath, by will, any of those goods or chattels which he hath jointly with another, though, by act in his life-time, he might dispose of his part: if he bequeath his portion thereof to a third person, the legacy is void, and the survivor shall have the whole, notwithstanding the will. But joint-merchants are to be excepted out of this rule; for the wares, merchandizes, debts, or duties, which they have as joint-merchants or partners, shall not survive, but shall go to the executor of him that dies; and this by the law of merchants. *Law of Test.* 188.

25. Generally, *if the legatee die before, the legacy be due, the legacy is extinguished.* Insomuch, that if the testator, by his last will, do bequeath his lands and tenements to a man and his heirs; yet if such person die before the testator, the devise is merely void, and his heirs cannot recover the land by force of the will; because the devisee was not in being when the will should take effect; and the word heirs, in this case, is not a designation of the person who shall take, but a limitation of the estate; for if it was a description of the person, then his widow would be endowed. *Plowd.* 345. *Swin.* 35, 560. *Law of Test.* 230.

And it will be as if no devise of the real estate had been made, which will descend to the testator's heir at law. *Lovell.* 206.

And so it is, if the legatee lives as long as the testator, but doth not survive him; for they may both die at one instant, as in a storm at sea, they may both be drowned together, or by the falling of a house, may both be killed at once: but if the legatee overlive the testator, even though it be but for a moment, the legacy is due, and may be recovered by the executors or administrators of the legatee. *Law of Test.* 231.

M. 6 An. Snell and Dee. The testator bequeathed, by his will, in these words; I give £100. apiece to the 2 children of J. S. at the end of 10 years after my decease. The children died within the 10 years. And by Cowper, lord chancellor; this is a lapsed legacy, and shall not go to the executors of the children: For the *diversity* is, where the bequest is to *take effect* at a future time, and when the payment is to be made at a future time: Whenever the *time is annexed to the legacy itself*, and not to the payment of it; if the legatee dies before the time of payment, it is a lapsed legacy in that case. 2 *Salk.* 415.

T. 1721. Bagwell and Dry. The testator, amongst other things, bequeathed the surplus of his personal estate unto 4 persons, equally to be divided among them, share and share alike; and made A B his executor in trust. One of the four residuary legatees died in the life of the testator. After which, the testator died. And the question being, to whom the 4th part devised to the residuary legatee, who died in the life of the testator, belonged; the lord chancellor, after time taken to consider of it, delivered his opinion, that the testator, having devised his residuum in fourths, and one of the residuary legatees dying in his life-time, the devise of that 4th part became void, and was as so much of the testator's estate undisposed of by the will; that it could not go to the surviving legatees, because each of them had but a 4th part devised to him in common, and the death of the 4th residuary legatee could not

not avail them, as it would have done, had they been all joint-tenants; for then the share of the legatee; dying in the life-time of the testator, would have gone to the survivors; but here, the residuum being devised in common, it was the same as if the 4th part had been devised to each of the 4, which could not be increased by the death of any of them. This share shall not go to the executor, he being but a bare executor in trust; and consequently it belongs to the testator's next of kin, according to the statute of distribution; and as to this, the executor is a trustee for such next of kin. 1 *P. Will.* 700.

M. 2 G. 2. Page and Page. A person deviseth to his 6 relations, all his lands, and all his personal estate, in trust, to perform his will, and after all these things discharged, directed that the remainder should be equally divided amongst them, share and share alike, and made his said 6 relations executors. One of the 6 legatees died, and then the testator died. The question was, whether the share of that legatee who died in the life-time of the testator, should go to the surviving legatees, as part of the residuum; or whether, in this case, it should go to the next of kin of the testator, as so much of his estate undisposed of. It was argued, that where there is a lapsed legacy, it falls into the residuum of the personal estate generally; but here a part of the residuum itself is a lapsed legacy, and consequently undisposed of, and ought to go to the next of kin of the testator. For the executors are to take nothing as executors, but as residuary legatees. And one of the legatees dying in the life-time of the testator, his share must go according to the statute of distributions, as undisposed of. And so it was decreed. *Str.* 820.

M. 1705. Elliot and Davenport. The testator, by his will, reciting, that *B* owed him £400. gave and bequeathed the same to him, provided that out of it he paid several particular sums in the will mentioned, to his wife and children, and the residue he freely and absolutely gave him, and required his executor, immediately on his death, to deliver up the security, and not to meddle with the debt, but to give such release as *B*, his executors or administrators, should require. *B* died in the life-time of the testator. It was held, that the money directed to be paid to the wife and children was well devised; but as to the residue devised to the debtor himself, it was a lapsed legacy, he dying in the life-time of the testator; but it was admitted, that if the testator had said, *I forgive such a debt*, or, that my executor shall not demand it, or shall release it, that would have been a good discharge of the debt, though the debtor had died in the life-time of the testator. 2 *Vern.* 521. 1 *P. Will.* 83.

T. 1731. Willing and Baine. The testator devised, by his will, £200. apiece to his children, payable at their respective ages of 21; and if any of them died before 21, then the legacy given to the person so dying, to go to the surviving children. One of the children died in the testator's life-time: And the question was, whether the legacy should go to the surviving children, or should be a lapsed legacy, and sink into the surplus. By the court: *The rule is true*, that where the legatee dies *in the life* of the testator, his legacy *lapses*; that is, it lapses as to the legatee so dying; but in this case the legacy is well devised over to the surviving children. 3 *P. Will.* 114. 2 *Vern.* 207.

One devises all his estate in D. to his four children, A. B. C. and D. (who were his younger children) their heirs and assigns for ever, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, *with benefit of survivorship*. C. died under age; his share shall survive to A. B. and D. and shall not go to the heir at law. *1 Wils. 165.*

In the case of Maybank and Brooks, it was contended that parol evidence should be let in to prove that the testator knew, at the time of making the will, that the legatee was dead; but the court would not admit it, but adjudged the legacy to be lapsed. *M. 1780. Bro. Cha. Rep. 84.*

Devise of a legacy to a person and his assigns; the legatee died before it was paid: adjudged, that his administrator shall have it as assignee in law. *1 Roll's Abr. 915.*

Where the legacy is conditional, the legacy is not due until the condition be performed: And therefore, if the legatee die before the condition is performed, the legacy is extinguished, except in some few cases. *Law of Test. 231.*

If a legacy be given to a person to be paid at the age of 21, though the legatee dies before that time, the legacy vests, and shall go to the legatee's representative, because the time is certain when the legatee would have been of that age if he had lived. *1 Wils. 161.*

If a legacy be given to a child, payable at his age of 21 years, and the child dies before he attain that age: though the administrator of the child is entitled to the legacy, yet he shall not have it till such time as the child, if he had lived, would have attained his age of 21 years. *2 Vern. 199. 2 P. Will. 478.*

A legacy is given to a grand-daughter in case she marry with consent: she dies without having ever been married. This is a condition precedent, and the marriage must have taken place before the legacy could vest; but if she had married without the consent required, this court would have decreed her the legacy, as it was not given over to any other person. *1 Wils. 159.*

If a legacy be given at 21, or day of marriage, with consent, if the legatee live till 21, and afterwards marry without consent, yet the devisee shall have the legacy, though it be given over, if she married without consent. *1 Wils. 161.*

But if a legacy be devised to a child, payable at his age of 21 years, and if he dies before that age, then the legacy to go over to another; in this case, if the child dies before he attains the age of 21, the 2d legatee shall have the legacy immediately. *2 Vern. 283. 2 P. Will. 478. Finer. Devise. G. d. 35.*

So if a legacy be given to an infant, to be paid at his age of 21 years, and the executors to pay interest for it until it becomes payable; if the infant dies before 21, it is due presently to the executor or administrator of the infant: but if no interest was to be paid for it, then it shall not be paid until such times as the infant would have come to 21 in case he had lived; because there it is a benefit the testator intended to the executor by keeping it in his hands; but in the other case it would be none, when interest was payable. *2 Freem. 64.*

So.

So where the testator bequeathed to an infant £1000. payable at 21; and in the mean time the infant to have the yearly sum of £20. not amounting to the interest of the legacy given him. The infant died before 21. It was held by Raymond chief justice, Jekyl master of the rolls, and Eyre chief justice, that the executors of the infant should wait for their legacy, till such time as the infant, had he lived, would have been 21; it being unreasonable that the executors of the infant, standing in his place, should be in a better case than the infant himself would have been had he been living; and it was to be presumed, that the testator had made a computation of his estate, and considered when the same would bear and allow of the payment of this legacy; and that no reason could be given, why an uncertain accident should accelerate the payment of this legacy before the time which was at first intended for that purpose. *2 P. Will. 335.*

Generally, it is to be considered, whether the time be joined to the substance of the legacy, or to the payment: If it be joined to the substance of the legacy, and the legatee dies before the day, the legacy is gone; as if the testator gives to B £100. when he cometh to the age of 21 years, and B dieth before, the legacy will not go to his executors or administrators: But if the day be joined to the payment of the legacy, the executors or administrators of the legatee shall have the legacy, though the legatee die before the day; as if the testator bequeath £100. to B, and wills that it shall be paid to B when he attains the age of 21 years, yet his executors or administrators may recover the legacy when the time is expired that B should have attained that age if he had lived. *Law of Test. 232, 233.*

And this is agreeable to the rule of the civil law, which is, that if a legacy be devised to one generally, to be paid or payable at the age of 21, or any other age; yet this is such an interest vested in the legatee, that his executor or administrator may sue for and recover it; for it is *debitum in presenti*, though *solvendum in futuro*, the time being annexed to the payment, and not to the legacy itself: So if the legacy is made to carry interest; though the words *to be paid*, or *payable*, be omitted, it shall be an interest vested. But if a legacy be devised to one *at 21*, or *if* or *when* he shall attain the age of 21, and the legatee dies before he attains that age, the legacy is lapsed. But where the legacy is to arise out of a *real* estate, this, by the better authorities, shall not go to the representative of the legatee, but shall sink in the inheritance for the benefit of the heir, as much as if it was a portion provided by a marriage-settlement. But when the legacy is to be paid out of a *personal* estate, the above distinction hath been allowed of; and Cowper lord chancellor said, that though it was at first introduced upon very slender reasons, and probably upon no other but from a constant willingness in the civil law to stretch in favour of a particular legatee, against the residuary legatee, who went away with the whole surplus of the personal estate; yet, as the chancery hath now a concurrent jurisdiction with the spiritual court in matters of this nature, he thought it highly reasonable that there should be a conformity in their resolutions, that the subject might have the same measure of justice in which court soever he sued. *Law of Test. 242, 243.*

By

By these instances we may observe that a *contingent* legacy, or legacy depending upon some event that may or may not happen; which is left to any one, *may* become a lapsed legacy, *although the legatee survive the testator.* Lovelass, 207.

So, in the case of *Boycot* and others, against *Cotton* and others, Nov. 24, 1738. It was said, by the lord chancellor Hardwicke, that it is now settled, whether the portion charged upon land be given with or without interest, by deed or by will, if the person dies before the age at which it becomes payable, it shall sink into the estate. 1 *Atk.* 555.

M. 1682. *Smith and Smith.* The testator devised £100. to his daughter, for her portion, chargeable upon a *real* estate, and payable at 21; and the daughter died before 21; the portion shall sink in the land. But it is otherwise, if no time had been limited for the payment of the portion; for in that case it goes to the executor of the daughter. And there is no difference, whether the portion is secured by settlement, or by will, if it be to be raised out of a real estate, and the party dies before it is payable; for in either case it sinks in the lands. 2 *Vern.* 92.

H. 1690. *Norfolk and Guildford.* The testator, by will, charged his lands with £6000. for the child his wife was then ensient with, if it proved a daughter; with a clause of entry for non-payment. A daughter is born, who dies. It was decreed, that the £6000. should not be raised for the benefit of her administrator, 2 *Vern.* 208.

M. 1684. *Bartholomew and Meredith.* The testator devised lands to be sold for payment of portions to younger children, and one of the children dies after the portion was payable, though before the lands sold. It was held, that it being an interest vested, his administrator should have it. 1 *Vern.* 276.

E. 1701. *Jackson and Farrand.* The testator, by will, gave £500. to his daughter, to be paid, by his executors, at the age of 21, out of his personal estate and the rents of his real; and if not raised by that time, the executors to stand seised and take the rents till £500. is raised; and after payment gives the land to his son. The daughter marries at 18, and dies under 21, leaving issue a daughter. The husband takes administration. It was held, that the portion should be raised, and that by a sale, though the land would produce little more than the £500. 2 *Vern.* 424. [But this, lord Hardwicke said, is an anomalous case, and no stress ought to be laid upon it. 1 *Atk.* 556.]

H. 1740. *Lowther and Condon.* Thomas Condon, esquire, by his will, gave unto his daughter, Diana Condon, the sum of £1000. to be raised and paid unto her immediately after the decease of her mother, out of her mother's jointure lands, with interest of £6. in the 100. from the death of her mother till the same should be paid. Thomas Condon dies. After which, his daughter Diana intermarries with Sir William Lowther, and dies in the life-time of her mother. Last of all the mother dies. And Sir William Lowther, as administrator to his wife, brings his bill for the recovery of the £1000. It was insisted by the defendant, the heir at law, that as the said sum was to be raised and paid out of the lands, and the late lady Lowther died before the time when this sum became payable, namely, before the death of her mother,

ther, the testator's widow, the same ought to sink into the estate, for the benefit of the heir, and ought not now to be raised. By Hardwicke lord chancellor: It is clear, if this were to be paid out of a personal estate, it would have been transmissible to an administrator: It is indeed true, that it hath been an established rule in general, as to real estates, that where a legatee dies before the time of payment of the legacy, it shall sink into the estate; but with regard to portions or fortunes for daughters, the circumstance of the legatee is to be considered; as where a portion is given to one immediately, payable when she attaineth the age of 21, or marrieth, and such person dieth before either of the contingencies happeneth, it ought to sink, because the legatee wanted no personal provision; but in this case, as lady Lowther was married, and lived married for some years; there is the less reason that it should sink. And it was decreed, that this was an interest vested, and as such transmissible to the administrator, and the legacy should not sink into the estate for the benefit of the heir at law. [But this determination was upon particular circumstances in the will, manifesting an intention that the portion in this event should not sink into the inheritance, but be transmissible; and particularly because the remoteness of the time of payment did not arise from the circumstances of the persons, but of the estate; the legacy being ordered to be paid as soon as the estate should be disincumbered. And upon the same ground, the like was determined afterwards in the case of *Sherman and Collins*, Feb. 4, 1745. 2 *Atk.* 127, 130. 3 *Atk.* 319.]

But it is said, if a legacy be chargeable *both* upon the real and personal estate; then so much thereof as the personal estate will extend to pay, shall go to the executors or administrators of the child; for in such case, as far as the executor or administrator claims out of the personal estate, he shall succeed according to the rule of the spiritual court where these things are determinable, although the infant legatee dies before the portion or legacy becomes due: but so far as such legacy is charged upon the land, the court of chancery will not countenance the loading of an heir, merely for the benefit of an administrator. 1 *P. Will.* 276, 601.

But in the case of *Van and Clark*, July 1, 1739. Lady Craven devised to Godfrey Clark (whom also she made executor and residuary legatee) her messuage and tenement in Lincoln's-Inn-Fields, and all her real and personal estate not otherwise disposed of, to the intent that out of the said real and personal estates so devised, her several legacies might be paid; amongst which, she gave to Thomas Lewis, to be paid within one year and a half after her decease, £2000. in trust and for the use of his daughter Mary Lewis, to be put out at interest, and the principal and interest to be paid to her at her age of 18, or marriage, which should first happen. Thomas Lewis died in the life-time of the testatrix: Mary Lewis died about half a year after the testatrix, unmarried. The representative of Mary brought his bill to have the £2000. paid to him. The defendant, Clark, admitted personal assets sufficient, but submitted to the court whether the plaintiff was entitled, and insisted that the house in Lincoln's-Inn-Fields was in the first place charged with this, and that it was not a charge merely on the personal

personal estate, but on the mixed fund of real and personal; and therefore the legatee dying before the time of payment, it ought to sink. By the lord chancellor Hardwicke: The infant dying before the time of payment to the trustee, I am of opinion makes this legacy not raisable for the benefit of the plaintiff, her representative. "If a legacy is given out of a *personal* estate, payable at a certain time; or if given at a certain time, and interest in the mean time, it is a vested legacy." "But the rule of this court as to legacies out of *real* estates is otherwise; for if given at a certain time, or payable at a certain time, yet if the legatee dies before the time is come, it sinks into the inheritance. So when a legacy is given out of a mixed fund of real and personal estate, at a certain time, or to be paid at a certain time, the construction is the same as if given out of a real estate only." *There is but a slight difference between the cases of legacies given at a day, or payable at a day; but the distinction is adhered to, only to give a consentaneous jurisdiction with the ecclesiastical courts: Nor is there any case that I know of, to warrant a distinction between legacies given out of a mixed fund of real and personal estate, and out of real estate only. If the infant had survived the year and half, (for the death of the trustee makes no distinction) it would have been extremely clear she would have been entitled to the legacy; and if then she had died before 18, or marriage, her representatives would have been entitled. But if this had been merely personal, as she died within the year and half, her representative could not have been entitled: for the whole git is in the direction of the payment; which makes that the substance. In the present case, it is not a legacy merely out of a personal estate, but out of both funds, and the real charged in the first place on the estate in Lincoln's-Inn-Fields. And this construction is more agreeable to the intention of the testatrix, as the sum was intended clearly as a portion for Mary: And the court always goes as far as it possibly can, to hinder the raising portions out of land for the benefit of representatives.* 1 Atk. 510.

CHAP. VI. *Of the Republication and Revocation of Wills.*

BY the statute of the 29 C. 2. c. 3. No devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing, declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or by his direction, in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of 3 or 4 witnesses, declaring the same. § 6, No. 331, p. 83; and No. 1582, § 3, p. 491, Pub. Acts.

And no will in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein be altered or changed, by any words, or will by word of mouth only, except the same be, in the life of the testator, committed to writing, and after the writing thereof

thereof read unto the testator, and allowed by him, and proved to be so done by 3 witnesses at the least. § 22. *Id.* and *Id.*

Where a will concerns real estate it is safe to republish it in a formal manner; as by the testator's taking it in his hand, and declaring the same to be his last will and testament, in the presence of 3 witnesses; and then to make a memorandum thereof in writing at the bottom of the will, or if there should not be room sufficient, then in the margin, or on the back thereof.

A republication requires the same solemnities as the original publication. *Doug.* 35. But this republication does not extend to implied revocations, or revocations in law. *Speke's case.* *Carth.* 81.

April 30, 1754. *Ex parte Hellier.* The question before Sir George Lee, as judge of the prerogative court, was, Whether the execution of a 2d will is a revocation of the 1st, though the 2d is afterwards cancelled, and whether such cancelling sets up the 1st will again? He gave sentence that it was a revocation, and that the cancelling the 2d did not set up the 1st. 3 *Atk.* 798.

M. 1689. *Eggleson and Speke.* Lady *Speke*, by will, gave her lands to one and his heirs. Afterwards she made another will, by which also she gave her lands to the same man and his heirs; but this last will was held void to pass lands, because the witnesses did not subscribe it in her presence. It was objected, that this was good however as a revocation of the former will. But by the court: It cannot operate as a revocation, because contrary to her apparent intent. To revoke by a will, within the words of the statute, must be by a will attested by 3 witnesses, and subscribed by them in the presence of the testatrix, which this will was not. *Carth.* 81.

If there be two inconsistent wills of the same date, neither of which can be proved to be the last executed, (unless explained by some subsequent act of the testator) both are void for uncertainty, and will let in the heir.

For revoking a former will, it is necessary that the 2d will should be subsisting, and effective, at the time of the testator's death: therefore, if it be not executed according to the statute of frauds, it is not effectual as to real estate.

H. 1716. *Onyons and Tyrer.* A man makes his will, duly executed and attested, and, at the same time, in like manner executes a duplicate thereof. Some time after, having a mind to change one of his trustees, he orders his will to be written over again, without any variation whatsoever from the 1st, save only in the name of that trustee. And when it was so written over, he executes it in the presence of 3 witnesses, and the 3 witnesses subscribed their names, but not in his presence. After this the testator cancels the duplicate, by tearing off the seal; and then dies. The question was, whether this 2d will, not being good as a will to pass lands, should yet be a revocation of the 1st; and if it should not, whether the cancelling the other should be a revocation thereof within this statute. And it was decreed, that neither the making the 2d, nor the cancelling of the 1st, was a revocation thereof, though in the 2d there was an express clause that he did thereby revoke all former and other wills: wherein the lord chan-

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cellor took this distinction, that the 2d was not intended barely as a revocation of the 1st, so as to signify his intention of dying intestate; but it was intended as an effectual will to pass the lands to the persons, and in the manner thereby devised; and therefore if it was not good as a will to that purpose, it was no revocation of the 1st. 1 *Abr. Eq. Cas.* 408.

A person made his will and a duplicate thereof, and delivered the duplicate to another person: afterwards he makes another will, by which he revokes all former wills, and, at the same time, he cancels that part of the former will which was in his own custody. Before his death he sends for an attorney to make a 3d will, but is senseless before he arrives. After his death the 1st and 2d will are found together in a paper, both cancelled; but the duplicate of the 1st is found uncanceled amongst his other deeds and papers. The act of cancelling the 2d will does not set up the duplicate of the 1st. *Burtenshaw and Gilbert. Cowper*, 49.

Where there are duplicates of a will, one in the testator's custody, and the other not; his cancelling the one in his custody is an effectual cancelling of both. *Id.* and *Douglass*, 40.

The mere act of cancelling a will is no revocation, unless done *animo revocandi*. *Cowper*, 52.

One having made his will, and devised all his freehold and copyhold lands to certain uses, afterwards purchases other copyholds, which he surrenders thus: "to the uses declared or to be declared by his last will and testament." This amounts to a republication, and the newly purchased copyholds shall pass to the uses of the will. *Heylyn v. Heylyn. Cowper*, 130.

When a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property he is seised of at the date of the republication, just the same as if he had such additional property at the time of making his will. *Id.* 132.

E. 1754. Ellis and Smith. A man makes a will, and by it revokes a former will. The only proof of the execution of this latter will was by 3 witnesses, who did not see him sign or seal it, but upon their being called in he acknowledged it to be his hand-writing and seal, pointing with his finger to the will; upon which they attested it. Two questions arose: 1. Whether, considering this as an original will, it is well executed. 2. If it is, whether it is well executed as a revocation, because by the statute it ought for this purpose to be signed in presence of the witnesses. By the lord chancellor *Hardwicke*: As to the former question, if this had been *res integra*, it would have been a matter of doubt with me; but it is *res adjudicata*, and must now be taken as decisive. All the cases where an attestation by 3 witnesses, at different times, is held good, are authorities in point; for they must all be founded upon the proof of this very fact, the acknowledgment of the testator that it was his hand-writing. It could not be a different execution before each witness, for then there would be 3 executions, and the act would not be complied with, as it requires 3 witnesses to one execution: and as to the sealing,—putting any thing on the seal,

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as a finger, *animo signandi*, is good enough. But he seemed to think that sealing was not *signing* within the statute, contrary to the *obiter* opinion in *Lemain* and *Stanley*. (3 *Lev.* 1.) As to the 2d, he said, that the words *signed in the presence of 3 witnesses*, refer to the next preceding words [*other writing*] only, and not to a will or codicil; and so it was determined (3 *Mod.* 218.) in the case of *Hoyle* and *Clarke*.

Where a man may have by him two or more wills, the latter thereof overthrows the former; but the republication of a former will revokes one of a later date, and establishes the first again. *Black. Com.* 2 vol. 502. So that what was before rendered void, becomes valid by the new publication. But the following case carries the principle further, where it is determined that the *cancelling alone* of a 2d will revives and gives effect to the first will *without any republication*.

H. 10 G. 3. Glazier v. Glazier. This cause had been tried at the assizes, and a verdict given for the plaintiff, the heir at law, against the defendant, who was devisee in 2 wills. It now came before the court, upon a motion, on the part of the defendant, for a new trial; which was opposed by the counsel for the plaintiff, who argued that both wills were revoked; and, consequently, their client took as heir at law. The question turned upon the revocation of the 1st will, by making the 2d. The 1st will was not cancelled. The 2d was cancelled by the testator himself. Both wills were in the testator's custody at the time of his death. The counsel for the plaintiff, the heir at law, argued, that the 2d will was a complete instrument at the time when it was executed. That it clearly proved the testator's intention of revoking the former: and that the execution of it was as much a revocation of the former, as if he had thrown the former into the fire. That the preservation of it was merely accidental, and of no consequence. That it had been already totally extinguished, so that it could never revive. That as it had never been republished, it remained a mere nullity; and that no subsequent event could hinder the execution of the 2d will from operating as a revocation of the former. The 2d will was, therefore, the testator's only subsisting will, so long as it remained uncanceled. And when he thought fit to cancel and destroy it, it is manifest that he meant to die intestate, and that his heir at law should take. If a woman makes a will, and then marries, her prior will is thereby revoked; and shall remain so, although she should immediately become a widow. They cited a case of *Ashburnham* and *Bradshaw*; and also the case *ex parte Hellier*, 3 *Atkyns*, 798; where Sir George Lee gave sentence, that the execution of a 2d will is a revocation of a 1st, though the 2d be afterwards cancelled; and that the cancelling the 2d did not set up the 1st; which, they said, was the same point, only that it was personal property: And this sentence was affirmed by the delegates. They denied the 2 cases of *Eggleston* and *Speke*, and of *Onyons* and *Tyler*, to be like the present case. The former is only, that a 2d will shall not revoke the 1st, if the 2d is not good in law, but void. The latter is, that a 2d will, devising lands to the same person, and revoking all former wills; and this 2d will subscribed by 3 persons, but not in the testator's presence, shall not revoke the former will, so as to let in the heir at law.—The coun-

sel on the other side, beginning to speak, were stopped by lord Mansfield, who said the case was so plain as to render it unnecessary to proceed. He observed, with regard to the case *ex parte Hellier*, that Mr. *Atkyns* only reports what passed in chancery. There might be other circumstances appearing to the ecclesiastical court, which might amount to a revocation of a will of personal estate. Here the testator has, by both wills, devised the lands in question to the defendant. His cancelling the 2d is a declaration, that he doth not intend that to stand as his will. Doth not that speak, that his 1st will shall stand? If he had intended to revoke the 1st will when he made the 2d, it must have operated as a declaration that the defendant should not take. But that could not be his intention; because he devises to the defendant by both. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will. If he does not suffer it to do so, it is not his will. Here he had two. He has cancelled the 2d: It has no effect, no operation; it is as no will at all, being cancelled before his death. But the former, which was never cancelled, stands as his will. *Burr. Mansf.* 2512. 1 *P. Will.* 344. Note 1. 4 edit.

Making a second will is not *in itself* a revocation of a former and still subsisting will: and if a subsequent will, either virtually or expressly revoking a former will, be destroyed, the former, if subsisting, is revived. *Cowp.* 91, 92.

A subsequent will (though the jury find it to contain a different disposition from a former, if the particulars of that difference be unknown) is no revocation of a former will. *Harwood v. Goodright.* *Cowp.* 87. 3 *Wil.* 497.

And if the jury do not find wherein the difference consists, between a former and a latter devise, the court cannot presume it. *Cowp.* 91.

A will revoked by a subsequent will, but not cancelled, is re-established by cancelling the subsequent will. *Doug.* 40.

But where there was a devise of lands to one, and afterwards the deviser, by a will duly executed and attested, devised the lands to another, who was a papist; it was decreed, that both the devises were void: for though the latter was void as a will, yet it was good as a revocation. 2 *Abr. Eq. Cas.* 771.

A change merely of the *legal estate*, from one trustee to another, is not a revocation of the will of *cestui que trust*. *Doug.* 691.

It cannot be laid down as a general rule, that the turning of a legal estate into an equitable one, will not be a revocation of a will. 1 *Wils.* 311.

But a will which will pass *personal estate*, is not a sufficient revocation of a former will, whereby a *real estate* is devised. *Comyns*, 451.

And although the statute says, that no will in writing, concerning *personal estates*, shall be repealed by word of mouth only, except the words be put into writing, and read to and allowed by the testator, and proved to be so done by 3 witnesses; yet where a man, by will in writing, devised the residue of his personal estate to his wife, and she dying, he afterwards, by a nuncupative codicil, bequeathed to another all that he had given to his wife, this was resolved to be good: for by the death of the wife, the devise of the residue was totally void; and the

the codicil was no alteration of the former will, but a new will for the residue. 1 *Abr. Cas. Eq.* 408.

If the will concerns only personal estate, it will not be amiss to use the formality of republishing it, though more slender evidence will be sufficient for the purpose.

Also, the statute hath not taken away revocations of wills by *act of law*; as if the testator afterwards make a feoffment, or do any other act inconsistent with the will: but such revocation remains as before the statute. *Carth.* 81.

And even, if the testator re-purchase the land, (after having first devised it, and then conveyed it away,) yet the will stands revoked by such conveyance. *Gilb. on Wills*, 101.

It is certain, that if a man seised in fee, devises, and afterwards conveys away the same, by any legal conveyance whatever, and takes back again a new estate; this is a revocation of the devise. Determinations in cases of revocations of wills have always been favourable to the heir at law. 1 *Wils.* 310.

If a man, seised in fee, devises, and afterwards makes a settlement on himself for life, remainder to his first and other sons in tail, without trustees to preserve contingent remainders, the fee is in him until a son is born; and if no son be ever born, the fee will never be out of him. There can be no doubt, but this would be a revocation of his will, though no son were ever born. The case of *lord Lincoln v. Rolls*, is a strong case to this purpose. 1 *Wils.* 312.

A common recovery suffered by tenant for life, with remainder to trustees to preserve contingent remainders, remainder to the same tenant for life, in fee, is a revocation of a will. 3 *Wils.* 6.

An implied revocation of a will may be rebutted by parol evidence, *Doug.* 38.

A will, revoked by implication, may be republished by reference to it, in an instrument attested according to the statute of frauds and perjury. *Doug.* 34.

If a man devises lands to one and his heirs, and afterwards mortgages the same lands to another for years or in fee; though a mortgage in fee is a total revocation at law, yet in equity it shall be a revocation *pro tanto* only. 1 *Abr. Eq. Cas.* 410.

And the reason is, because a mortgage is not considered as a conveyance of the estate, but only as a charge upon it; being merely a security, and in the consideration of equity carries only a chattel interest; the creditor gains nothing real; it affords no dower, and goes to executors. *Sparrow and Hardcastle*, May 6, 1754. 3 *Atk.* 798.

But if lands be devised to one in fee, and afterwards mortgaged to the same devisee; this is a revocation *in toto*, being inconsistent with the devise: but if the mortgage had been to a stranger, it had been a revocation *quoad* the mortgage only. *Préc. Cha.* 514.

For it hath been admitted to be a *settled rule* in chancery, that where a testator devises his lands in fee to one, and after mortgages it in fee to another, and then dies before the principal and interest is paid, this is not a *total revocation* of the will, but *quoad* the mortgage only, or as far as the mortgage; and the devisee shall have the equity of redemption. 1 *Salk.* 236, 258.

There

There must be an inconsistent disposition in the whole, or in part, of the latter devisee to revoke the former; and if in part, it is a revocation in part only. *Cowp.* 90.

Where a testator, seised in fee, afterwards leases, for lives or years, or mortgages, or conveys to pay debts; these are only revocations pro tanto, and shew particularly how far the testator intended to alter his will, by drawing the line exactly. 1 *Wils.* 310.

One having, by will duly attested, devised all his lands to trustees, in trust to sell, &c. and out of the interest of the monies arising by such sale to pay an annuity to his wife, legacies to his children, &c. afterwards obliterates, interlines, and alters all the bequests, without attesting such alterations, &c. and without republishing his will. It was held, that the devise to the trustees to sell was not revoked. *Sutton v. Sutton.* *Cowp.* 812, 814.

If a mortgagor devises the mortgaged premises, and afterwards pays off the mortgage; and the mortgagee conveys the legal estate to a trustee in trust for the mortgagor; such a transfer of the legal estate shall not operate as a revocation of the will. *Doug.* 684.

If a man, seised in fee, devises it to one in fee or for life, and afterwards makes a lease to another for years; this, even at law, shall not be a revocation but during the years. For the testator's intent does not appear further than during the term of years, 1 *Rolls Abr.* 616.

So if a husband, possessed for 40 years, devises it to his wife, and after leases the land to another for 20 years, and dies; this lease is not any revocation of the whole estate, but only during the 20 years, and the wife shall have the residue by the devise. *Id.*

Though in case a person has devised lands to one and his heirs, and afterwards leases the same to him for a certain term, to commence after the devisor's death, this is a revocation of the whole estate. *Id.*

But where a man, seised of a lease for lives, devised it, and afterward surrendered the old lease, and took a new one to him and his heirs for 3 lives; it was decreed, that this renewal of the lease was a revocation of the will as to this particular. For by the surrender of the old lease the testator had put all out of him, had divested himself of the whole interest; so that there being nothing left for the devise to work upon, the will must fall, and the new purchase, being of a freehold descendable, could not pass by a will made before such purchase. 3 *P. Will.* 166, 170.

June 10, 1743. *Sir Thomas Abney and Miller.* The testator, by his will, devised all his college leases which he then held of Magdalen college, to Mrs. Burton his mother, to be sold by her immediately after his disease, and ordered the money arising by such sale to be distributed according to the directions of the said will. Some years after making the will, he surrendered the college leases devised by it, and accepted 2 new leases of the premises; but one of them was not sealed with the college seal till after the death of the testator. Lord Hardwicke decreed, that the lease actually renewed after the will made, was a revocation of the devise; but otherwise as to the lease not perfected for want of the college seal. 2 *Atk.* 593. 5 *New. Abr.* 527.

And thus it hath been lately determined where a leasehold estate was specifically

specifically given and surrendered by the testator, after having made his will. *Hone and Medcraft*, 1783. *Bro. Cha. Rep.* 261.

But where the testator devised *all and singular his leasehold estate*, and afterwards renewed a lease; it was held by lord Hardwicke, clearly, that this leasehold estate passed by the will; for that this is not a specific legacy, but only an enumeration of the several particulars of the personal estate, but yet is a general devise of the whole. 3 *Atk.* 199.

Though a covenant or *articles* do not at law revoke a will, yet if entered into for a valuable consideration, amounting in equity to a conveyance, they must consequently be an equitable revocation of a will, or of any writing in nature thereof. 2 *P. Will.* 624.

Lord Mansfield said, in the case of *Heylyn v. Heylyn*, that the reporters were very inaccurate in saying that a thing is so or so in equity. Now there is no republication in equity that is not so in law. But the expression *in equity* is very likely to mislead students, and make them imagine there is a distinction. *Cowp.* 132.

A woman's marriage is alone a revocation of her will. *Id.*

Marriage alone is a revocation of a will of land made by a woman. *Doug.* 34.

A man made a will, and appointed one (who was no relation) to be his executor. He afterwards went abroad, where he became a governor of one of the plantations, and sent over for an English woman of his acquaintance, whom he married and had children by; and died, without an actual revocation of his will. Yet it was determined, that this *total alteration of his circumstances* was an implied revocation. 1 *P. Will.* 304. *Eyre and Eyre. Gilb. on Wills*, 99.

Marriage, and the birth of a child, amount to a revocation of a will, if it is of all the testator's land. *Doug.* 38.

So in the case of *Lugg and Lugg, M. 8 W.* Before the delegates. One being single, made his will, and devised all his personal estate. Afterwards he married, and had several children, and died without other will or disposition. It was ruled, that there being such an alteration in his estate, and circumstances so different at the time of his death from what they were when he made the will; here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind. 2 *Salk.* 592. *L. Raym.* 441. *Black. Com.* 2 vol. 502.

If any person, making a will, shall afterwards marry, and die, leaving issue; it shall be deemed and taken to be a revocation of such will. § 10, No. 1582, p. 492, *Pub. Acts.*

London, December 27, 1792. Wednesday a case, which the court of King's Bench considered to be of great importance, was solemnly argued and determined.

It came before the court upon a special verdict.

The facts were these. A man made a will while he was single. He afterwards married, and his wife became pregnant, in consequence of which he expressed an intention to alter his will; but before he could carry his intention into effect, he died, and after his death the child, with which his wife was pregnant, was born.

The question for the opinion of the court was, whether the marriage and pregnancy was an implied revocation of the will?

After

After counsel were heard on both sides, the court were unanimously of opinion, that a marriage and pregnancy, where the child was born in the life-time of the husband, amounted to a constructive revocation of any will he might make previous to his marriage. The learned judges also were clearly of opinion, that the same doctrine applied to the case of a posthumous child. The will was of course revoked.

And in the case of *Brown and Thomson, T. 1702.* The lord keeper was of opinion, that alteration of circumstances may be a revocation of a will of *lands*, as well as of a *personal* estate, notwithstanding the statute, which doth not extend to an implied revocation. *1 Abr. Cas. Eq. 413.*

CHAP. VII. *Of the Probate of Wills.*

I. THERE shall be ordinaries appointed in the several districts of this state, to be chosen by the senate and house of representatives jointly, by ballot, in the house of representatives, who shall, within their respective districts, exercise the powers heretofore exercised by the ordinary. § 24, *Constitution of South-Carolina, passed 1778.*

All other officers shall be appointed as they hitherto have been, until otherwise directed by law: (*in which clause ordinaries are included.*) § 2, *Art. 6. Constitution of South-Carolina, passed 1790.*

The powers and authorities heretofore used and exercised by the ordinaries of the districts where county courts are established, shall be, and the same are hereby vested in the judges of the county courts. § 5, *No. 1492, Pub. Acts, p. 433.*

The late ordinaries of the several districts where county courts are established, are directed to deliver up all the records in their respective offices, to the clerks of the pleas of the several circuit courts in the said districts respectively; and to which said records every person may have recourse, when, and as often as they may think proper, upon paying 1s. for each and every search or examination: and the ordinary refusing, or wilfully neglecting so to do within 6 months after the order of the county court served on him, shall be liable to the penalty of £ 50. to be recovered in any court of record, for the use of the county whose order he may have disobeyed or neglected as aforesaid. § 13, *No. 1524, Pub. Acts, p. 454.*

Justices of county courts, and the ordinaries of the several districts wherein no county courts are established, may grant letters of administration and probate of wills, § 1, *No. 1582, p. 491, Pub. Acts.*

If any person shall bargain or sell any office, or deputation of any office, or any part thereof; or take any reward, promise, covenant, bond, or other assurance to receive any profit, directly or indirectly, for the same, or to the intent that any person should have or enjoy the same; *which said office shall in any wise concern the administration or execution of justice*; he shall forfeit all his interest therein, and right of nomination thereunto: and he who shall give or pay, or make such promise or agreement as aforesaid, shall be disabled in the law to have and enjoy the same; and such bargain shall be void. But acts done by

by such officer so offending, before he be removed, shall be good in law. § 1, No. 650, p. 146, *Pub. Acts.*

Any office.] In *Dr. Trevor's* case, *H. 8 Ja.* It was resolved by the opinion of the justices, upon a reference to them by the lord chancellor, that the office of chancellor, register, and commissary in the ecclesiastical courts, are within this statute; which statute being made for avoiding of corruption in officers, and for the advancement of persons more worthy and sufficient to execute the said offices, by which justice and right shall be advanced, shall be expounded most beneficially to suppress corruption. 12 Co. 78. *Cro. Ja.* 279.

Or deputation of any office.] In the case of *Culliford* and *Cardonell*, *H. 8 W.* The defendant was made deputy to the plaintiff in his office, and gave bond to pay the plaintiff half the profits. On putting the bond in suit the defendant pleaded this statute. But the determination of the court was, that such bond is not within the statute, because the condition is not to pay him so much in gross, but half the profits, which profits must be sued for in the principal's name; for they belong to him, though out of them a share is to be allowed to the deputy for his service. But in the case of *Godolphin* and *Tudor*, *M. 3 An.* where the deputy was to have the fees, and in consideration thereof was to pay £200. a year, and save the principal harmless, this was declared to be within the statute. And it was held by the court, that where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good: so, if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good: For in these cases the deputy is not to pay unless the profits rise to so much. And though a deputy, by his constitution, is in place of his principal, yet he has no right to the fees; they still continue to be the principal's; so that as to him it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and such bond is void by the statute. *Gibs.* 980. 2 *Sal.* 466, 468.

If a person, having spiritual jurisdiction, assign to another, for his salary, a certain sum, so that he answer to his principal for the whole profits, this is lawful; but if the other be to retain the whole profits to himself, and answer to his principal a certain sum, this is unlawful. *Lind.* 282.

He shall forfeit all his interest therein.] In the case of *Sir Arthur Ingram*, *M. 13 Ja.* It was resolved by the lord chancellor Egerton, and Coke chief justice, to whom the king had referred it, upon conference with the other justices, that the disability here intended is such, that the person is utterly disabled, during life, to take the same office, although that afterwards becomes void by the death of any other, and a new grant be made to him. 3 *Inst.* 154.

2. If the testator shall have a mansion-house, or known place of residence, his or her will shall be proved in the court of the county, or before the ordinary of the district, in case there are no county courts, where such house is or place of residence was; but if the testator had

no such place of residence, and lands are devised in the will, it shall be proved in the court of the county, or before the ordinary, as the case may be, where the lands lie; or in one of them, where there are lands in several counties: and if the testator had no such place of residence, and there are no lands devised, then the will shall be proved either in the county where such testator died, or where the whole or greatest part of his or her estate shall be. § 12, No. 1582 p. 492, *Pub. Acts.*

Whenever the ordinaries of those districts where there are no county courts shall be appointed executors of any persons within their jurisdiction, and shall chuse to take on them the execution of such will, they must prove it before one of the judges of the common pleas, who may also, in cases of administration, grant letters thereof to such ordinary as shall apply for the same. No. 1557, p. 472, *Pub. Acts.*

By the statute of the 4 An. c. 16. *Whereas great trouble and expence is frequently occasioned to the widows and orphans of persons dying intestate, to monies or wages due for work done in her majesty's yards or docks, by disputes happening about the authority of granting probate of the wills and letters of administration of the goods and chattels of such person; for the preventing thereof, it is enacted, that the power of granting probates of the wills and letters of administration of the goods and chattels of such persons, is hereby declared to be in the ordinary of the diocese, or such other persons to whom the ordinary power of probate of wills or granting letters of administration do belong, where such persons shall respectively die; and that the wages or pay due from the queen to such persons, for work done in any of the yards or docks, shall not be taken or deemed to be bona notabilia whereby to found the jurisdiction of the prerogative court.* § 26.

3. A caveat is a caution entered in the ordinary's court, to stop probates, administrations, and such like, from being granted without the knowledge of the party entering it.

By the common law, a probate, administration, or the like, contrary to a caveat entered, shall stand good: in the eye of which law the caveat is said to be only a caution for the information of the court; but that it doth not preserve the right untouched, so as to null all subsequent proceedings, because it doth not come from any superior. 2 *Bac. Abr.* 404.

4. A citation is a summons issued by the court of ordinary, to convene all persons before him, to object to the probate of a nuncupative or other will, or to the granting of administration to some particular person who has applied for the same, or upon the entering of a caveat by any person, that he should appear and support his caveat on some particular day.

The citation therefore ought to contain, 1. The name of the ordinary. 2. The court from whence such citation issued. 3. An appointed day and place, when and where the parties must appear. 4. The cause why the citation issued; and, 5. (if the citation was applied for) The names of the party at whose instance the citation is obtained.

By a constitution of Otho, it is directed, that if the person to whom the citation is committed shall not be able to find the party, he shall cause the letters to be publicly read and expounded on the Lord's day, or other solemn day, in the church of that place where the deceased usually

usually dwelt, during the celebration of mass; which form still continues to be practised in this state.

The clergyman who reads the citation in any public place of worship, usually tests the same before he returns it into the ordinary's court.

In the city of Charleston the citation is read in that place of worship which the deceased usually frequented; and not in the Episcopal churches exclusively; in the country generally in the parish church; and, where there is no clergyman, by some respectable magistrate, at any public meeting of the inhabitants of the parish where the deceased resided.

No citation can be issued after probate of a will; nor can the ordinary review his former probate. But if the will has been proved only in common form, then upon application it must be reviewed.

5. By the statute of the 25 G. 2. c. 6. for avoiding doubts concerning who shall be deemed legal witnesses to wills (which is inserted before under the head *concerning the qualification of the witnesses*)—
 “Whereas in some of the British colonies or plantations in America, the act of the 29 C. 2. has been received for law, or * acts of assembly have been made whereby the attestation and subscription of witnesses to devises of lands, tenements, and hereditaments, have been required; therefore, to prevent doubts which may arise in relation to such attestation, it is enacted, that this act shall extend to such of the said colonies and plantations, where the said act of the 29 C. 2. is by act of assembly made, or by usage received as law; or where by act of assembly or usage the attestation and subscription of a witness or witnesses are made necessary to such devise; and shall have the same force and effect in the construction of, or for the avoiding of doubts upon, the said acts of assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of, or for the avoiding of doubts upon the said act of the 29 C. 2. in England.—Provided, that no devise or legacy shall be made void by this act, unless the will whereby such devise or legacy shall be given, shall be made after March 1, 1753.”

After the 29th September, 1732, the houses, lands, negroes, and other hereditaments and real estates, situate, or being within any of the said plantations belonging to any person indebted, shall be liable to, and chargeable with all just debts, duties and demands of what nature or kind soever, owing by any such person to his majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond or other specialty. 5 G. 2. c. 7. *Pub. Laws*, p. 250.

An executor who takes no beneficial interest, is a competent witness to prove the testator's sanity. *Doug.* 134.

If a person interested execute a surrender or release, he is an admissible witness, although the surrenderee, &c. should refuse to accept such surrender or release. *Id.*

It is no objection to an executor's testimony, that he may be liable to actions as executor *de son tort*. *Id.* 136.

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* 29 C. 2. made of force here by A. A. 1712.

An estate in the plantations is testamentary, and assets to pay debts; for if the executor hath goods of the testator in any part of the world, he shall be charged in respect thereof. 6 Co. 46. 2 Ventr. 358.

A question naturally arises here, "whether executors and administrators ought not to make a return (in their inventory of the property of "a deceased person,) of the lands belonging to such person; since they "are assets in the hands of such executor or administrator, for the "payment of debts?"

6. Wills only concerning goods and chattels are under the cognizance and direction of the ecclesiastical laws. *Gibs.* 463.

And the probate of testaments concerning lands only, and no goods contained therein, ought not to be in the spiritual court; and if there be a suit to compel to have the probate of such testaments, a prohibition lieth. *Cro. Car.* 396.

But where a will is concerning lands and goods, and so is a mixt will, the probate thereof shall be entire in the spiritual court, and ought not to be of parcels; but the probate of the will for the land will not prejudice the heir; for it shall not be evidence at the common law; nor the witnesses being there examined, shall such examinations be given in evidence at the common law. *Cro. Car.* 396.

And where a will doth contain in it lands and goods; generally, the courts temporal will not grant a prohibition to stay the probate thereof for the whole: but if in a special case, it be alledged that the testator was of non-sane memory, or the like, a prohibition will be granted for the whole. For if the spiritual court should be suffered to proceed, and prove the will there, and allow it there, for the personal estate, it would be an evidence to induce the jury, upon a trial at law, to pass for the will as to the lands and tenements. *E. 12 J. Egerton and Egerton.* *Cro. Jac.* 346.

But it appears requisite by the 12 §, No. 1582, p. 492, *Pub. Acts*, "that a will shall be proved in the court of the county, or before the ordinary "where the lands lie, if lands are devised in the will." And again, by the 7 § of the same act, "If any will in writing shall contain devises of real "estate, and also legacies of goods and chattels, and such will cannot be "proved so as to pass the real estate, the same shall not, for that cause, be "void as to the bequests of the goods and chattels."

7. But a devise of a personal estate is not looked upon to be of any effect until probate is made of the will by the executor; neither can an executor or other person give a will in evidence, concerning a personal chattel, without producing the probate; for this will is no will until it has received a sanction, or an allowance of it in the spiritual court; for they are to judge whether it be a will or not; and the temporal courts are not to look upon it as a will till probate be made: And in an action of trover for goods which a testator gave to his sister in his life-time, brought against his executor for them, who would have given in evidence a former will, to have shewn that he had no power to give those goods; this was refused, because he ought to have produced the probate. *Chaunter and Chaunter*, 1708. *Viner. Executors*, A. a. 20.

And a probate obtained in the ecclesiastical court cannot be set aside in any other court either of law or equity. In the case of *Barnesly and Powel*,

Powel, Aug. 5, 1748; a probate of a forged will was obtained in the ecclesiastical court, by a fraud upon the plaintiff in procuring his consent to such probate; and by the like means a decree in the court of exchequer was obtained to establish the said will as to the real estate. Upon these facts being disclosed, and a bill filled in chancery, an issue was directed to try the validity of the will at law, which the jury found to be forged. And the question was, what could now be done, especially with respect to the personal estate; and the decree in the exchequer likewise standing in the way with respect to the real estate. Lord Hardwicke said, as to the decree in the exchequer, the same having been obtained by fraud, *though he could not set it aside, yet he could decree that no use should be made of it.* As to the personalty, undoubtedly the jurisdiction of wills of personal estate belongs to the ecclesiastical court, according to the rules of which court it must be tried, notwithstanding that the will is found forged by a jury at common law by examination of witnesses; which is sometimes unfortunate, causing different determinations: nor can this court help it. But in the present case his lordship decreed, that the defendant should consent in the ecclesiastical court to a revocation of the probate; and though he would not then decree the defendant a trustee of the personal estate, lest it might create some jealousy of infringing on the ecclesiastical court, yet he decreed an account of the personal estate to be taken, and the same to be paid into the bank for the benefit of the parties intitled. *1 Ves. 119, 284.*

8. He that is named executor cannot be precisely compelled to stand to the will, and undertake the executorship, unless he have already meddled with the goods of the testator as executor; for then, he is not only to be compelled to perform the office of an executor, but also, if he should refuse, and the ordinary commit the administration unto him, this refusal is void, and he shall be charged as executor. *Swin. 384.*

Therefore, if the executor named in the testament resolve not to stand to the executorship, but to refuse the same; then must he beware that he do not administer the goods of the deceased as executor; for having once administered as executor, he may at any time after be compelled to undergo the burden of an executor, and also may be sued as executor by the creditors of the testator; though he cannot sue others as executor, for that he hath not the will under the ordinary's seal. *Swin. 469.*

And a person is then said to administer as executor, so as thereby he may be compelled to stand to the executorship, when he doth perform those acts which are proper to an executor; as to pay the debts due by the testator, or to receive any debts due unto the testator, or to give acquittances for the same, with other such like acts. *Swin. 469.*

But if a man do those acts which are not proper to an executor, he is not said to have administered as executor to the effect as aforesaid; as to feed the cattle of the deceased, lest they should perish; or to take into his custody the goods of the deceased, to the end they may be safe from being stolen or purloined; or to dispose of the testator's goods about the funeral: for these be deeds of charity common to every christian,

christian, and not peculiar to an executor. Likewise, to make an inventory of the goods of the deceased, is not to administer as executor; or to deliver to the wife her convenient apparel; or to take the testator's horse and ride him, or to use him as his own, supposing him not to be the testator's, but his own; or to take the goods of the testator by his lawful gift. And generally, whosoever is a mere trespasser entereth on the goods of the testator, whether it be to things living, as horse, kine, sheep, or dead things, as pots, pans, dishes, converting the same to his proper use, and not to the use of the testator, as to the payment of the testator's debts or legacies, doth not administer as executor. *Swin.* 471, 472.

Howbeit, in these cases and such like, whosoever feareth to be adjudged executor, administering of his own wrong, the most safe course is, not to meddle at all, but utterly to abstain from all manner of use of the testator's goods; and namely, let him beware that he do not sell any goods, or kill any cattle of the deceased. *Swin.* 472.

Further, although a person hath not meddled with the goods of the testator, and is therefore not compellable; *yet, if a legacy be left to him, he may be compelled to stand to the executorship, or else to lose his legacy.* *Gibs.* 469.

This doctrine of forfeiture of a legacy, by an executor, for not qualifying, is, I apprehend, not applicable to this country. In England the legacy left to the executor is intended as some compensation to him for the trouble he would have in administering the goods of the testator; but with us provision is made by law for the payment of the executor; testators, therefore, being cognizant of this law, and leaving a legacy to their executors, must intend them an additional benefit to the per centage the law allows. § 12, *No.* 748, *p.* 203; and § 29, *No.* 1582, *p.* 495, *Pub. Acts.*

The refusal to take upon him the executorship cannot be by word only; but it must be entered and recorded in court. *Swin.* a. 443.

And when an executor hath once administered, he cannot afterwards refuse to prove the will, and take upon him the executorship; and, in that case, the ordinary ought not to accept such a refusal, but to compel him to prove the will, and take upon him the executorship. Yet, if the judge doth admit one to administer, notwithstanding his having been formerly refused, it shall stand good. *Swin.* a. 443.

9. An executor of his own wrong is such as takes upon him the office of an executor by intrusion, not being constituted by the testator or deceased, nor (for want of such constitution) substituted by the ordinary to administer. *Went.* 171.

If a stranger takes upon himself to act as executor, without any just authority, (as by the intermeddling with the goods of the deceased, and many other transactions) he is called an executor of his own wrong, and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, &c. as mentioned in the preceding § 8, art. 4, will not amount to such an intermeddling as will charge a man as executor of his own wrong. 2 *Black. Com.* 507.

If a man gets goods of an intestate into his hands after administration

is actually granted, it doth not make him executor of his own wrong; but if he gets the goods into his hands before, though administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he delivers the goods over to the administrator before the action brought, and then he may plead *plene administravit*. *1 Salk. 313.*

An executor of his own wrong cannot bring an action; for he cannot shew the testament containing his name, as he ought. *Br. Administrator 8.*

Neither can he retain for his own debt or legacy. *Mo. 527. Popsh. 125.*

But he renders himself liable to the action, not only of the right executor, but also to the suits of the testator's creditors; *yet only so far as the goods which he so wrongfully administered amount unto.* *Swin. 339. Harr. Justin. 87. Viner. Executors. E. a. 4, 5.*

So also, it is said, he shall be sued for legacies, as well as a lawful executor. *Noy, 13.*

In all actions by creditors against such an officious intruder, he shall be named executor generally. *5 Rep. 31.* For the most obvious conclusion which strangers can form of his conduct, is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof. *12 Mod. 471.*

But if he doth lawful acts with the goods, as paying of debts in their degrees, it shall alter the property against the lawful executor; as if he pay just and honest debts, the rightful executor shall not avoid that payment. It is true, the rightful executor may maintain against him an action of trover: but he shall only recover in damage so much as the wrongful executor hath misapplied. By Holt chief justice. *12 Mod. 471.*

But Mr. Wentworth is of opinion, that albeit such payment shall stand good as against other creditors, yet it is not good as against the rightful executor or administrator: for then any stranger might usurp the office of executor, and take from him that liberty and election to prefer which creditor he will in first payment; yea, might take from the executor power to pay himself before others, in case there were a debt due to him, which would be unreasonable. *Went. 182.*

And as he himself is liable to the suit of the lawful executor, creditors, or legatees; so also, in case of his death, are his executors or administrators liable, by the statute of the * 30 C. 2. c. 7. Although in other cases, a personal wrong dieth with him that did it. And although he hath obtained probate, yet, if upon appeal such probate shall be annulled and made void, acts done by him, pending the appeal, shall not be good. As in a case, *M. 5 An.* In the common pleas. An action was brought by the plaintiff, as executor, for money due from the defendant to his testator. The defendant pleads, that another person was appointed executor to the testator, and proved his will, and that he the defendant had paid him part of the money in satisfaction of the whole; and that the said person, on receipt thereof,
discharged

* In force here. See p. 84, Pub. Laws; and copied verbatim into the 32 §, No. 1582, p. 495, Pub. Laws.

discharged the defendant. The plaintiff replied, that the probate granted to the other person was afterwards, upon appeal, annulled by sentence in the ecclesiastical court, and the will by which he was made executor, adjudged to be forged, and the will by which the plaintiff is appointed executor, allowed. On demurrer, the question was, whether payment to one who was executor de facto, and had probate of the will, was good to bind the rightful executor. And the court gave judgment, that it was not. And by Trevor chief justice: *An executor derives all his authority from the testator himself; and, as executor, without any thing more, he has the power of disposing of the estate of the testator, of releasing a debt due to the testator, and the like. True it is, before an action brought, a probate is necessary; but that is only requisite to ascertain the court that the plaintiff is executor, and has a right to bring his action; not to give the plaintiff any title or interest to the estate of the testator. If the testator appoints no executor, or dies intestate, the administrator is appointed by the ordinary, and derives his authority from him; and therefore, if administration is granted, all acts by him, as long as the administration continues in force, are good, and even though it be afterwards repealed.—But there is a difference taken (6 Co. 18.) when an administration is repealed upon a citation, or upon an appeal. If it is upon an appeal, which suspends the administration, all acts after such suspension are void: If it is repealed upon a citation, all the acts of the administrator, till the repeal, are good; for by the citation the grant of the administration is not suspended; therefore, if the administration be repealed, all acts done by an administrator which a rightful administrator might have done, shall be allowed, for in them he acted in the place of the rightful administrator. But it is otherwise in the case of an executor; for the probate of the will gives no authority at all to him; and therefore, if he is not the rightful executor, he has no authority; and it would be unreasonable, that a person who has no authority should dispose of the interest of another. The rightful executor has not only a trust or authority to administer the goods of the testator, but also an interest annexed to the trust. And therefore, the property of all the goods, after administration, is completely vested in him. And consequently, the disposition by another person, of the goods of the testator, or release of his debts, is a disposition of the interest of the rightful executor, and therefore such disposition doth not bind him. And this case is not like the case of an officer, who officiated without legal authority, as the deputy of the deputy of a steward; for rightful acts done by him are good: for he is an officer de facto, and in the immediate and open execution of his office, and the parties did not know whether he had authority or not.—And he said, in this case of an executor some mischief indeed may possibly happen; but it would be a more general inconvenience, if a wrongful executor should be allowed to dispose of the right and interest of a rightful executor. Comyns, 150. Anonym.*

An administrator of his own wrong is chargeable with the debts of the deceased, so far as assets came to his hands; and, as against creditors in general, shall be allowed all payments made to any other creditor,

ditor, in the same, or a superior degree, himself only excepted. And though, as against the rightful executor or administrator, he cannot *plead* such payment, yet it shall be allowed him in mitigation of damages; unless perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt. 2 *Black. Com.* 507.

10. Where there are divers executors named in the will, and some of them do refuse, and others of them prove the testament; they who refuse may after, at their pleasure, administer, notwithstanding such refusal before the ordinary. 9 *Co.* 37. *Bacon's Use of the Law*, 161. *Perk.* 212.

And this is what is called a double probate; which is in this manner: The first that comes in takes probate in the usual solemn form. Afterwards, if another comes in, he also is to be sworn in the usual manner,* and a certificate, to the following effect, under the hand, but not the seal, of the ordinary, is given to him.

“ — day of October, in the year of our Lord —. In the court
“ of ordinary.

“ I do hereby certify, that C. D. did this day qualify as an executor
“ of the last will and testament of E. F. late of the parish of —, de-
“ ceased.

“ C. L. ordinary for — district.”

And the same form is observed, and a similar certificate given, if there are more come in afterwards and qualify.

For notwithstanding their refusal at first, they still continue executors; and at any time during the lives of their companions, they may prove the will, they may pay debts, make releases, and they must be joined in all suits where the co-executors are plaintiffs, because they are all privy to the will; but not where they are defendants, because the plaintiff in the action is not bound by law to take notice of any but those who have proved the will. *Swin.* a. 444.

For the king's courts have always used to allow the probate of some of the executors, to enable them all to sue actions: so that the probate of the testament doth not give to them any interest or title either to things in action or in possession, for they have all their title and interest by the testament, and not by the probate; but yet, without the probate, the judges allow them not to sue actions. 9 *Co.* 38.

It is holden, that he which did refuse the executorship, cannot assume that office after the death of his fellow executor. *Swin.* 326, 418.

But in the case of *House* and *Lord Petre*, Dec. 19, 1700. Before the delegates: The common lawyers held, that if one executor refuseth before the ordinary, and the rest prove the will, yet, at common law, he who refused may, at any time, come in and administer; and though he never acted whilst his companions were living, yet, after their death, he shall be preferred before any other executor made by a co-executor; although

* The ordinary in England gives a probate to each executor, and an engrossment of the original will. Surely this is a more eligible mode; and as no law forbids it, it might be adopted in the courts of ordinary here.

although the civilians held, that by their law the renunciation was peremptory. 1 *Salk.* 311.

11. If a man maketh two executors, and dieth, and one of them proveth the will in the name of them both, against the will of the other; this is not any administration for him who consented not to the probate: but he may plead *ne unques executor*; for the probate maketh him not executor, if he doth not administer. 1 *Roll's Abr.* 918.

12. Swinburne says, when all the executors named in the testament do refuse, it is lawful for the ordinary to commit administration, and to annex the will to the letters of administration; and the administrators shall have action, and may administer the goods of the deceased, as if he had died intestate; and their authority or act done is good and effectual in the law in the mean time, until the executors undertake the executorship; for then the ordinary may revoke the administration before by him committed. *Swin.* 380, 383. 1 *Roll's Abr.* 907.

So also, if a man make an executor, but this is not known, or is concealed; the ordinary may grant administration, and this shall be good until the other prove the will. 1 *Roll's Abr.* 907.

And so, in like manner, if the person be disabled to be executor, or no executor at all be named in the will. *Swin.* 380.

But (lord Coke says) if they all refuse before the ordinary, and the ordinary commit administration to another, there they cannot administer afterwards. 9 *Co.* 37.

And by lord chancellor *Talbot*, in the case of *Robinson and Pett, E.* 1734. Where there are two executors, and one renounces, he is still at liberty, whenever he pleases, to accept of the executorship; otherwise, if both renounce, and the ordinary commits administration to another. 3 *P. Will.* 251.

When any person shall make a will in writing, without appointing any executor therein, or such executor shall refuse to qualify; the court where such will shall be proved, shall grant letters of administration, with the will annexed, to such person as would have been entitled thereto if the deceased had died intestate. § 11, No. 1582, *p.* 492, *Pub. Acts.*

This is a material alteration of the old law; for, in the case of a will, if the executors refuse, or if there are no executors, the administration must be granted in the same manner as if the deceased had died wholly intestate, by the 16th § of this act: whereas the rule has hitherto been, that the administration should be granted to some one of the legatees, generally to the residuary legatee.

13. Regularly [that is, by the civil law,] testaments ought to be insinuated to the official, or commissary of the bishop of the diocese, within 4 months next after the testator's death. *Swin.* a. 447.

There is no precise time fixed, by the laws of this country, for the insinuation of a will to the ordinary: but the rule laid down by the civil law may, perhaps, be generally adopted. Nevertheless, to oblige a person to prove a will, the 17th § of No. 1582, enacts, that if any person, having in possession the will of a deceased person, shall neglect to produce the same to be proved, process, as for contempt, shall issue from the court where such will ought to be proved; and the person shall

shall be fined and imprisoned until the will shall be delivered up.
P. 492, Pub. Acts.

Although there is no express power given to the ordinary under this last §, as is given to the ecclesiastical courts in England, by 21 H. 8. c. 5: *to convent before him the persons named executors, to prove the will, or refuse acting thereunder*; yet I apprehend, that the ordinary, from the nature of the case, and from the reason of the thing, and to enable him to commit any person for neglecting to produce such will, must be vested with the power of issuing citations and summonses upon such occasions.

Executors may pray time to advise before they consent to qualify; and the ordinary may grant, in the mean time, letters *ad colligendum bona defuncti*. *Treatise of Eq. 109.*

14. And the executor, for goods of the testator taken from him, or a trespass done upon the lease land, or a distraining or impounding of goods or cattle, may maintain, before the will be proved, actions of trespass, or replevin, or detainue: for these actions arise upon the executor's own possession. *Went. 34.*

But before the proving of the will, an executor cannot maintain a suit or action of debt, or the like; and the reason is, for that therein he must shew forth the will proved under the seal of the ordinary. *Went. 34.*

And, in general, an executor is a complete executor before probate, to all purposes but bringing of actions; so that he may release an action, assent to a legacy, may be sued, may alien, or otherwise intermeddle with the goods of the testator. *1 Salk. 301.*

For, by administering, the executor hath accepted of, and taken upon him the whole administration before the probate; and is thereby entitled to receive all debts due to the testator; and all payments made to him are good, and shall not be defeated, although he should die and never prove the will. *1 Salk. 306, 307.*

Also, the executor may, in convenient time, after the testator's death, enter into the house descended to the heir, for the removing and taking away of the goods, so as the door be open, or at least the key be in the door; and this seemeth to be understood of the door of each room. For although the door of entrance into the hall and parlour be open, the executor cannot by that justify the breaking open of the door of any chamber, to take the goods there; but only may take those in the rooms which be open. And this seemeth to be proved by the case of the chest with evidences; which, it is said, the executor may take, and put out the deeds, delivering them to the heir; that is to say, the chest being unlocked. Now, a chamber or other room within the house locked, is an inclosure of better respect than a chest. But, if the goods be not removed within convenient time, the heir may distrain them as damage feasant. *Went. 92.*

T. 5. *Ja. Stodden and Harvey*. Trespass: Upon demurrer, the case was; lessee for life of a house and pasture-lands dies; his executors suffer his cattle to go there for six days after his death, and then removed them: and in trespass, justify for that time: averring, that in that time

of 6 days, they could not procure any other land or place to put in the cattle. Whereupon it was demurred. And whether that were a convenient time to remove them was the question. And the court seemed to incline, that 6 days is but a convenient time for the removing of their cattle; and the law allows a convenient time for their removing, especially it being averred, that they had not any other place to remove them unto. But for a fault in the plea, wherein he pleaded a lease of the house, but not of the land in the declaration mentioned, it was adjudged for the plaintiff. *Cro. Ja.* 204.

In like manner, the executor, before probate, may be sued for the debts of the testator, unless he refused the executorship in due manner, so as administration may be granted, and so there may be somebody suable for the testator's debts. *Wentw.* 36.

So, a bill for discovery of effects may be brought before probate: as in the case of *Dulwich college* and *Johnson*, *E.* 1688. A bill for a discovery of the personal estate was brought before the will was proved, the will being controverted in the spiritual court. And this was pleaded to the bill; but over-ruled: a discovery being for the benefit of all persons interested, and necessary for the preservation thereof. And such discoveries have often been ordered, *pendente lite* in the spiritual court. *2 Vern.* 49.

And in the case of an administrator, a court of equity will allow of a bill brought by an administrator before administration is actually taken out: as in the case of *Fell* and *Lutwidge*, February 3, 1740. The widow brought a bill for recovery of the effects of her late husband, and did not take out administration till after the bill brought. It was objected, that the bill was brought too early. By the lord chancellor Hardwicke: It is very true, that this would have been an exception in an action at law; but it is not so to a bill brought in this court. And the exception was over-ruled. *Bernard, Cha. Ca.* 320.

15. On the other hand, (inasmuch as the executor, though he may be sued, and pay debts, and release an action, yet cannot *have* an action, before probate) the ordinary is *bound* to prove the will; and if the executor accept, and desire probate, and is refused by the ordinary, a writ will go from the temporal courts, to compel him to proceed to probate, where the will is not controverted. *Gibs.* 469.

But if the validity of the will is contested, it is a sufficient answer by the ordinary to a writ of mandamus, to return, that a suit is depending before him concerning the same, and not yet determined. *Bur. Mansf.* 2295.

16. The manner and form of proving testaments, is of two sorts: the one is called the vulgar or common form; the other is termed the solemn form, or form of law. *Swin.* 448.

The vulgar or *common form* is more compendious or brief than the other: for after the death of the testator, the executor presenteth the testament to the judge; and in the absence, and without citing or calling of such as have interest, produceth witnesses to prove the same; who testifying upon their oaths *viva voce*, that the testament exhibited is the true, whole, and last testament of the party deceased, the judge doth thereupon

thereupon (* and sometimes upon lesser proof) annex his probate and seal to the testament, whereby the same is confirmed. *Swin* 448.

If a will is not properly executed and attested by witnesses, where the deceased wrote the same himself, before it can be proved in the ecclesiastical court, it is requisite that his hand-writing be proved by an affidavit of two disinterested persons; or if another person wrote it, that the writing or will produced is the will of the deceased. And if there should be material interlineations or alterations made in a will not of the testator's own hand-writing, an affidavit is also required of some person to prove, that such were made by the testator's direction. *Lovelass, Explanation, p. 10.*

A testament of chattels written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good, provided sufficient proof can be had that it is his hand-writing. *Godolph. p. 1. c. 21. Gilb. Rep. 260.*

And though written in another man's hand, and never signed by the testator; yet, if proved to be according to his instructions, and approved by him, it hath been held a good testament of the personal estate. *Comyns, 452, 3, 4.*

It is not necessary to the proof of a written will, that the witnesses hear it read, so as they can depose that the testator declared before them, that the self-same writing now produced is or was his last will and testament. *God. O. L. 66.*

In 1 *P. Will.* 741, it is said, that in proving a devise of lands, the proper way is, that the witness should not only prove the executing the will by the testator, and his own subscribing in his presence; but likewise that the rest of the witnesses subscribed their names in the testator's presence; and so one witness proves the full execution of the will.

But in the case of *Townsend and Ives*, May 9, 1748; at the rolls: A bill was preferred by the legatees to have the real estate sold for the payment of their legacies, which were charged thereupon, against the heir at law of the testator, who is an infant, and to have the will established. There were 3 witnesses to the will, all now living, but only one has been examined, who proved the execution of it, and the attestation of the other 2 witnesses. But Fortescue master of the rolls, refused to establish the will, without the examination of all the witnesses; for it is a rule, that all the witnesses, if living, must be examined to prove the will: Besides, the heir at law is, in this case, an infant; who, if of age, has a right to cross-examine all the witnesses. And as no admission of this sort can be received for an infant, this court must protect his right, and therefore must insist upon all those requisites which he would have a right to insist upon if he were of age, and capable of making a defence for himself. 1 *Wilson*, 216.

So in *Ogle and Cook*, Dec. 10, 1748: Upon a bill for establishment of a will and performance of the trust, it was objected, that only 2
of

* By which I suppose he means, the oath of the executor or administrator alone, or in case of the death or absence of the witnesses, or if there are no witnesses to the will, by the oath of disinterested persons, who can prove the hand-writing of the testator, agreeable to the doctrine of God. *VIDE INFRA.*

of the witnesses to the will were examined, and some account ought to be given why the 3d was not, as that he could not be found, or the like. Lord Hardwicke held it necessary to the establishment of a will; for if, after the decree, the heir at law should controvert it, the court would order an injunction: nor did he care to make a precedent to the contrary; for if this other witness were called, he might say something material against it; and therefore ordered it to stand over till the 3d was examined. *1 Vez. 177.*

E. 12 G. 2. Croft and Paulet. On a trial at bar in ejectment, the defendant made title under a will, the attestation of which was in these words; *signed, sealed, published, and declared, as and for his last will and testament, in the presence of us, A, B, and C.* The will was in 1723, and the witnesses were all dead, and their hands proved in common form. But then it was objected, that this was not an execution according to the statute; and the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence of the testator was not one. But the court, on the authority of a case in the common pleas, said it was evidence to be left to a jury of a compliance with all circumstances. And a verdict was given for the will. *Str. 1109.*

Generally, by the civil law, the testimony of two witnesses is required; and if, in the probate of a will, the testimony of one witness is disallowed in the ecclesiastical court, a prohibition lieth not: for that court having jurisdiction of the matter, hath it also as to the manner of proof and proceedings. *2 Roll's Abr. 300.*

But Dr. Godolphin says, where there is no controversy or dispute touching the will, there the single oath of the executor alone is sufficient for the probate thereof in common form. *God. O. L. 65.*

When the testament is to be proved in *form of law*, it is requisite that such persons as have interest, that is to say, the widow and next of kin to the deceased, to whom the administration of his goods ought to be committed if he had died intestate, are to be cited to be present at the probation and approbation of the testament; in whose presence the will is to be exhibited to the judge, and petition to be made by the party which preferreth the will, and enacted for the receiving, swearing, and examining of the witnesses upon the same, and for the publishing or confirming thereof: whereupon witnesses are received and sworn accordingly, and are examined every one of them secretly and severally; not only upon the allegation or articles made by the party producing them, but also upon interrogations ministered by the adverse party, and their depositions committed to writing: afterwards the same are published; and in case the proof be sufficient, the judge doth, by his sentence or decree, pronounce for the validity of the testament. *Swin. 448, 449.*

Which difference of form in proving the will worketh this diversity of effect; namely, that the executor of the will proved in the absence of them which have interest, may be compelled to prove the same again in due form of law; and if the witnesses be dead in the mean time, it may endanger the whole testament, especially if 10 years be past since the probation, whereby necessary solemnities are presumed

to have been observed: whereas, the testament being proved in form of law, the executor is not to be compelled to prove the same any more; and although all the witnesses afterwards be dead, the testament doth still retain its full force, *Swin.* 449.

But probably this word *ten* in figures may have been mistaken for *thirty*; for Dr. Godolphin says, the will being proved only in common form, it may be questioned at any time within 30 years next after, by common opinion, before it work prescription. *God. O. L.* 62.

And this proving of the will in solemn form, is for the most part at the instance of some person who desireth to invalidate the same: In which case his proctor, at the time of exhibiting the will, ought to accept the contents thereof so far forth as it maketh for the benefit of his client; otherwise, if any legacy is given to him in the will, he shall lose it, for his general impugning of the will. *1 Ought.* 21.

And in such case, where an executor hath been called to prove the will by witnesses, and hath fully proved it; if the party who caused him to do this shall not, after publishing the attestation, except against the will or the witnesses, nor propose any matter to hinder the passing of sentence for the validity of the will, the judge doth not usually condemn him in costs: But otherwise it is, if he shall propose such matter and fail in the proof; for then he will be condemned in costs, at least from the time of such proposal. *1 Ought.* 20.

Where an executor hath the greatest part of the goods of the deceased bequeathed unto himself, and he doubteth, after the witnesses shall be dead, that the wife or children, or other kindred of the deceased, will contest the validity of the will, he may cite them in special, and all others pretending interest in general, (and so is the usual practice,) to see the will proved by the witnesses; which being done, the will shall not be set aside afterwards, (provided there hath been no irregularity in the process,) when the witnesses are dead. *1 Ought.* 20.

It appears then, from what has been said above, that in England the oath of the executor is sufficient to prove the will *in common form*; and that it is necessary that the next of kin, or such persons to whom the administration of the deceased person's goods would have been committed if he had died intestate, are to be cited to be present at the probate of the testament, to constitute a proof *in solemn form, or form of law*. But the practice which has prevailed in this state, is, that the executor, upon producing the will to the ordinary, shall prove the same by the oath of one of the witnesses thereto; or if they be dead, or absent from the state, by the oath of other disinterested witnesses; and not by the oath of the executor or administrator with the will annexed. But although that this is the common form here, yet, in case of a will being contested, the proof of the will must of course be in solemn form.

Where the executor is infirm, or lives at a great distance, the ordinary is authorized to grant a commission to some respectable persons in the neighbourhood, to administer the oaths, and perform the other requisites for granting probate of the will. So also in the granting of administrations. § 1, No. 748, p. 201, *Pub. Acts*.

But the act of 1789 seems very unadvisedly to have taken this power from the ordinary as to administrators; for it enacts, that every administrator

nistrator shall take the oath *in open court.* § 21, No. 1582, p. 493, *Pub. Acts.*

17. Swinburne says, if a testament be made in writing, and afterwards be lost by some casualty; yet if there be two witnesses [that is, in the case of goods and chattels,] which did see and read the testament written, and do remember the contents thereof, these two witnesses, so deposing of the tenor of the will, are sufficient for the proof thereof in form of law; so that they be otherwise as well in respect of their skill as of their integrity, greater than all exception, and specially some other likelihoods concurring therewithal to make their testimony more credible. *Swin.* 450.

If any person applying for letters of administration on the estate and effects of any person deceased, will not swear that such deceased made no will, consistent with the knowledge or belief of such person so applying for such administration, in manner as directed by law to be sworn, but will make it appear, upon oath, that such deceased had made a will, which cannot be found by such person so applying; and that such person, applying for such administration, verily believes the said will to be lost or destroyed, together with the causes and reasons for such belief; the ordinary, or person empowered to grant administration, and to whom such application is made, may grant such letters of administration to the person so applying for the same, during such time as the said last will shall be so lost, and until the same shall be found, and duly proven according to law, and no longer: provided, that all affidavits to be made of the loss or destruction of any last will and testament, whereon to ground an application for letters of administration, pursuant to this law, shall be made before, and taken in writing by the person to whom such application is made, and signed by the parties swearing; and sworn to, shall be filed and recorded in the office of such person granting such administration. No. 1199, § 2, *Pub. Laws*, p. 290.

If an executor proves a will of a personal estate, wherein one of the legacies is forged, the executor in such case hath no remedy in equity; but ought to have proved the will, with special reservation to that legacy. *Plume and Beale.* 1 *Peere W.* 388. 2 *Vern.* 8, 17. In which case, the forgeries are to be decreed against in the ecclesiastical court, and the will engrossed without them, and so annexed to the probate.

18. You A B do swear, that you will produce to, shew and inform the appraisers that shall be appointed by the ordinary, all and singular the goods and chattels of the said C D, deceased, as already have, or shall, before the day of making the appraisement, come into your hands, possession or knowledge. *A. A.* 1745.

Every executor or administrator, with the will annexed, at the time of proving the will, or granting administration, shall take the following oath. *I do solemnly swear, that this writing contains the true last will of the within named A B, deceased, so far as I know or believe; and that I will well and truly execute the same, by paying, first the debts, and then the legacies contained in the said will, as far as his goods and chattels will thereunto extend, and the law charge me; and that I will make a true and perfect*

perfect inventory of all such goods and chattels. So help me God. § 20, No. 1582, p. 493, Pub. Acts.

19. A testator having thought the executor appointed by him a proper person to be entrusted with his affairs, the ordinary cannot adjudge him disabled or incapable; neither can he insist upon security from the executor, as the testator hath thought him able and qualified. 1 *Salk.* 299.

Yet the court of chancery, where an executor is considered as a trustee, if he becomes insolvent, will oblige him to give security before he enters upon the trust. 2 *New. Abr.* 377.

And an executor may be compelled to give security for paying a legacy; as where £1000. was devised to a person to be paid at the age of 21 years; and upon a bill exhibited against the executor, suggesting a devastavit, and praying that he might give security to pay the legacy when due, it was decreed accordingly. 1 *Cha. Ca.* 121.

So where the testator devised £800. to an infant, to be paid by his executor when the infant should attain the age of 21 years, and the infant, by his guardian, exhibited a bill, that the executor might give security for the payment of the money; it was accordingly decreed. *Law of Ex.* 187.

And if a person, possessed of a lease for years, devise that his executors, out of the profits thereof, shall pay to every one of his daughters £20. at their full age; the executor may be sued in the spiritual court to put in security to pay the legacies; and as this being to issue out of a chattel, no prohibition shall be granted. 1 *Roll's Abr.* 285.

But where a legacy was given to a grand-daughter, to be paid at 21, or marriage, and if she died before either of those contingencies happened, then to go over to another: Lord Hardwicke was of opinion, that as the legacy was devised over, nothing vested in the grand-daughter till one of the contingencies should happen; and therefore she was not entitled to have it secured. 1 *Atk.* 505.

20. If an executor becomes non compos, then the spiritual court may commit administration. 2 *New. Abr.* 376.

But if the executor becomes bankrupt, it is said the ordinary cannot grant administration to another. 1 *Salk.* 299.

21. The administrator, with the will annexed, shall enter into bond, with good and sufficient security, to be approved by the court, in a sum equal to the value of the estate at least; the condition of which bond shall be in form following, to wit:

The condition of this obligation is such, that if the above bound C D, administrator (with the will annexed) of the goods, chattels and credits of E F, deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which have or shall come to the hands or possession or knowledge of the said C D, or into the hands or possession of any other persons for him, and the same so made, do exhibit into the said court of ———, at such time as he shall be thereunto required by the said court, and the same goods, chattels and credits do well and truly administer, according to law, and make a just and true account of his actings and doings when by law required; and further, do well and truly pay and deliver all the legacies contained and specified

specified in the said will, as far as the said goods, chattels and credits will extend, and the law require; then this obligation to be void, or else to remain in full force. Which bond shall be made payable to the justices of the county court, and their successors, and recorded in the clerk's office; or to the ordinary of the district, as the case may be; and may be sued, from time to time, by any person injured by the breach thereof, until the whole penalty be recovered; and the damages sustained being assessed on such suit by the verdict of a jury, may be levied by execution, and paid to the party for whom they were assessed. § 20, No. 1582, p. 493, *Pub. Acts.*

In the case of *Folkes and Docminique*, T. 13 G. 2. where the executor was under the age of 17 years, the court allowed a bond given by the administrator with the will annexed, during the minority of the executor, to be good at common law, and not obtained by coercion. *Str.* 1137.

22. Every executor or administrator shall, upon oath, be bound to produce and shew to the appraisers that shall be appointed by the ordinary for that purpose, or any 3 or more of them, all and singular the goods and chattels of the said testator or intestate, as have or shall come into their, or either of their hands, possession or knowledge; and within 60 days after such his or her qualification, shall cause to be made a true and just appraisement, *upon oath*, of all and singular the goods and chattels aforesaid, and exhibit, or cause to be exhibited, the said appraisement, certified under the hands of any 3 or more of the appraisers aforesaid, into the secretary's office in Charleston, within 90 days after such qualification; together with a full and perfect inventory of all and singular the rights and credits of the said testator or intestate, whether the same be in ready money, judgments, bonds or other specialties, or notes of hand; together with a list or schedule of the books of account of such testator or intestate person, and the number of pages in such books; to which books all parties concerned shall, at all convenient times, have free access; and every such executor and administrator shall be chargeable with the real value of the goods and chattels in the said inventory contained, and with so much of the said credits only as he shall, after due and proper diligence, recover and receive, in like manner as executors and administrators are made chargeable by the common or statute law of England. § 1, No. 748, p. 201, *Pub. Acts.*

When any will shall be proved, or application is made for administration of the estate of any person dying intestate, the court shall direct the executors or administrators to make out an exact inventory of the personal estate of the deceased, and shall appoint 3 or more reputable freeholders, who shall appraise the same on oath; which inventory and appraisement shall be returned to the next court to be held in the county, or to the ordinary of the district, in cases where there are no county courts, within such time as the ordinary shall limit: and if the goods lie in several counties, the court having jurisdiction, shall order appraisement, and appoint appraisers, in each; which, when made, shall be transmitted by the appraisers to the court where the will was recorded, or administration granted. § 13, No. 1582, p. 492, *Pub. Acts.*

23. The appraisers shall be allowed 4s. and 8d. each, by the day, whilst employed in appraising any estate; to be paid by the executors or administrators; which expence shall be allowed them in the settlement of their accounts. § 14, *Id.*

No appraiser, that shall hereafter be appointed to appraise any testator or intestate's goods and chattels, shall enter upon that office before they shall have taken the following oath before a justice of peace, who is hereby empowered to administer the same: *You A B, C D, and E F, do swear, that you will make a just and true appraisement of all and singular the goods and chattels (ready money only excepted) of G H, deceased, as shall be produced by I K, the executor (or administrator) of the estate of the said G H, deceased; and that you will return the same, certified under your hands, unto the said I K, executor (or administrator) within the time prescribed by law.* § 7, No. 748, p. 202, Pub. Acts.

24. If the will is a written one, the officer before whom it is proved, issues his probate and warrant of appraisement, under his hand and seal, to the executor or administrator, with the will annexed, and gives him a copy of the will, certified under his hand: and in case of nuncupative wills, the evidence produced should be reduced into writing, and recorded.

The probate being now complete, the ordinary makes a minute thereof in a book kept for that purpose, in the following words: “*— day of —, in the year of our Lord —; proved the last will and testament of C D, late of the parish of —, planter, deceased, by the oath of A B, one of the subscribing witnesses to the same: at the same time qualified I K and L M, executors.*”

25. The will is recorded in a book kept for that purpose by the ordinary; at the end of which record is inserted, *proved before C L, Esq; ordinary of — district, the — day of —, in the year of our Lord —.* And the warrant of appraisement and letters testamentary are likewise recorded.

Formerly all wills, warrants of appraisement, and inventories, were lodged in the office of the secretary of state in Charleston; but since the great alteration which has taken place in this jurisdiction, by the erection of the county courts, the ordinary for the district of Charleston still lodges those wills there which come into his possession, though not required by law so to do; and the ordinaries of the other districts and clerks of the several counties, retain them in their own hands: but, according to the act of 1745, the appraisement and inventory should still be lodged in the secretary's office in Charleston.

The clerk of every county court, or ordinary of the several districts, shall, once in every year, in the months of January and February, return into the secretary's office of the state, a list of all probates and administrations granted in their respective courts within the preceding year; which shall express the date of the certificate of probate, or letter of administration, name of the testator or intestate, names of the executors or administrators, and their securities, and penalty of their bond; which lists shall be carefully filed, those of each county and district separate from the rest, in the said secretary's office. § 22, No. 1582, p. 494, *Pub. Acts.*

The ordinaries of the districts of Charleston, Georgetown, and Beaufort, who shall qualify as executor or administrator to any deceased person, shall record in their several offices the last wills and testaments on which they shall respectively so qualify; and the probates thereof, and letters of administration, and all other proceedings in cases testamentary and of administration, in the same manner as is practised with respect to cases where they may not be interested, after the same shall have been recorded in the office of the clerk of the district where such will shall be proved, or administration granted as aforesaid. *No. 1557, p. 473, Pub. Acts.*

26. The probate of a will, or a copy of the will out of the register of the spiritual court, are not to be allowed as evidence in the case of lands. *Dike and Polhit. L. Raym. 744.*

H. 7 G. 2. Morse against Roach and others. In the chancery: Before the year 1718, the method was to deliver out a will of land, to be proved at trials, or on commissions, upon security. Since that, the registers have refused to deliver out the will, but insist upon being paid for attending with it; and where it was wanted at a distance, their demands did run very high. In this case an order was made (upon producing three precedents,) that it should be delivered out on security; it being a bill brought by creditors and legatees, who were not likely to suppress it. *Str. 961.*

Nov. 23, 1738. Frederick and Aynscombe. A will was executed at Bullonge; and proved here in common form, and deposited in the prerogative court of Canterbury. One of the witnesses resided at Bullonge. On a bill brought to perpetuate the testimony to the said will, it was moved, that the register of the prerogative court, or the record keeper, might be ordered to deliver out to the defendant the original will, on his giving a reasonable security to return the same, after the examination of the witness at Bullonge. And it was directed by the lord chancellor Hardwicke, that the defendant should be at liberty to take out a commission to examine his witness at Bullonge; and it appearing that the defendant was the only devisee who could claim any real estate under the will, he ordered the will to be delivered out by the proper officer to a person to be named by the defendant, on his giving security, to be approved of by the prerogative court, to return the will in three months. He said, if the defendant had not been the sole devisee of the real estate, but there had been other persons under the will interested in it, and they had refused their consent, he would not have made this order; because the taking a will out of the kingdom is different from any former cases, they having gone no further than ordering them to different parts of England. *1 Atkyns, 627.*

But the act of assembly, passed in 1721, enacts, that an attested copy of all records, signed by the keeper of such records respectively, shall be deemed and allowed for as good evidence in the courts in this province, as the original could or might have been, if produced to the said courts: and also all testimonials, *probates*, certificates, and other instruments under the great seal of this province, or any of the other governments in America, bishop of any diocese, lord mayor of London, or mayor or chief magistrate of any town corporate in Great-Britain, Ireland,

Ireland, or any of the plantations, or elsewhere, or under the court seal of any court of judicature, or under the sign manual and notarial seal of any notary-public of any of the places aforesaid, shall be likewise deemed and allowed to be good evidence in any of the courts of judicature in this province. § 40, No. 464, p. 117, *Pub. Acts.*

The clerk of the court before whom the will shall be proved, or administration granted, on the application of the executors or administrators, shall give to them a true copy of the order of such court respecting such probate or administration, certified under his hand, which shall be sufficient to entitle them to maintain actions for the recovery of possession of the estate therein mentioned. § 18, No. 1582, p. 493, *Pub. Acts.*

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state: and the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. § 1, art. 4, *Const. United States.*

27. The seal of the ecclesiastical court (as to goods and chattels,) doth authenticate the will, and is not to be contradicted; because, as there is no way in the temporal courts to prove the will relating to chattels, it must go on in the spiritual court, and the determination must there be final. For the temporal courts cannot make a judgment concerning the will, contrary to what was made in the ecclesiastical court; and therefore, if a probate is shewn under the seal of the ordinary, they cannot give in evidence that the will was forged, or that another person was executor; but they may give in evidence that the seal was forged, or that there were bona notabilia, because it is not in contradiction to the real seal of the courts; but it admits the seal, and avoids it. And since the ecclesiastical court hath now the probate of wills settled by custom, the temporal court cannot prohibit them in their inquiries, whether the testator was compos mentis or not, or whether the will be revoked or not, because that is necessary for authenticating the will. *Str.* 671, 672.

And by Holt chief justice; the judge of the spiritual court is the only proper judge to determine the validity of wills for things personal, and therefore the probate is undeniable evidence to a jury: and he said he remembered a case in the time of lord chief justice Kelyng, where an executor brought an action, and at the trial produced the probate, and the defendant's council offered to prove that the supposed testator died intestate; but Kelyng chief justice told them, that the probate was evidence uncontrovertible; and with him concurred the other judges; and so it hath been always held since. *L. Raym.* 262.

But yet it is held, that if the probate of wills and granting administrations be traversed or denied in the king's courts, and issue joined, that the ordinary did not commit administration to such a one, or that the testament is not proved before the ordinary, or that he whose will is proved before the ordinary died intestate, or that he of whose goods administration is granted, as if one intestate made a will; in these and the like cases it is held, that certificate shall not be made by the ordinary, but that it shall be tried by jury: and the reason given
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for it is, that the probate of wills and granting administration originally did not belong to the ecclesiastical cognizance, but were given to them of later times; and that, therefore, nothing but the probate and granting administration, which were given to them, doth appertain to their jurisdiction; but the *trial* thereof is not given to them, but is left to the trial of the common law. *Gibs.* 468. 9 *Co.* 40.

But before this time (in the 31 *El.*) in case of refusal or no refusal, how it should be tried; this distinction was laid down: where the issue is, whether the executor did refuse before such a day, or after, there the trial shall be by jury; contrary, where the issue is upon refusal generally, because the refusal is before the ordinary as a judge. And the case then before the court, being this, "That the bishop certified "that he did not refuse, whereas in truth he had refused before the "commissary;" the court held, that they could not write to the commissary, since the bishop and not he was the officer unto the court to that purpose, and that the party could not aver against the certificate of the bishop any more than against the return of the sheriffs. *Gibs.* 468.

M. 8 *G.* *The King* against *Vincent* and others. Indictment for forging a will relating to a personal estate; and on the trial a forgery was proved: but the defendants producing a probate, that was held to be conclusive evidence in support of the will. *Str.* 481.

T. 12 *G.* *The King* and *Rhodes*. The defendant exhibited a will in doctors commons, as executor, and demanded probate. After a long contest there, it was determined in favour of the will; and upon appeal to the delegates, the sentence was confirmed. Afterwards, the parties who had been concerned in cooking up the will, fell out amongst themselves about the division of the estate; and thereupon it came out that the will was forged; and upon full affidavits of the forgery, a commission of review (which it was agreed was the only method to bring the matter over again) was granted by the lords justices: and an indictment was also found for the forgery, and stood ready for trial in the king's bench. Upon motion for a *habeas corpus ad testificandum*, Raymond chief justice declared that he would not try the cause. For there being yet a sentence subsisting in favour of the will, and the validity of that being now put under a proper examination, he did not think it fitting to determine the property by an indictment, which would come on more properly after the sentence was reversed. *Str.* 703.

In the case of *St. Leger* and *Adams*; Holt chief justice said, without doubt the register's book, in the spiritual court, is good evidence to prove that there was a will, although it be lost. *L. Raym.* 731.

And in the case of *Shepherd* and *Shorthose*, *H.* 7 *G.* Where the probate is lost, an exemplification of it from the act of the spiritual court hath been allowed as evidence of the will being proved. *Str.* 412.

H. 8 *W.* *Hoe* and *Nelthrope*. It was held by Holt chief justice, that the copy of the probate of a will is good evidence, where the will itself is of chattels, for there the probate is an original taken by authority, and of a public nature; otherwise, where the will is of things in the realty, because in such case the ecclesiastical courts have no authority

authority to take probates, therefore such probate is but a copy, and a copy of it is no more than the copy of a copy. 3 *Salk.* 154.

But the will of a feme-covert, authorized by a power in her marriage-settlement, cannot be given in evidence to shew a title to personal estate, till it is proved. *Doug.* 681.

Depositions taken in the ecclesiastical court (although the witnesses be dead) are not evidence in an action at common law: but a sentence given in the ecclesiastical court (it being a judicial act) may be given in evidence in an action brought in the temporal courts. *Wats. c.* 58.

By the statute of the 4 *An. c.* 16. entitled, an act for the amendment of the law, and the better advancement of justice, *No advantage or exception shall be taken of or for the default of alledging the bringing into court letters testamentary; but the court shall give judgment according to the very right of the cause, without regarding any such imperfections, omissions and defect, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer.* P. 94, *Pub. Acts.*

28. No executor or administrator shall be hereafter permitted to take any estate, or any part thereof, at the appraisement; and no appraisement shall be binding or conclusive, either upon the creditors, legatees, next akin, or other persons interested in such estates, or upon the executors or administrators; but such executors or administrators shall be accountable and chargeable for the true value of such estates. § 3, *No. 748, p. 202, Pub. Acts.*

Every appraisement may be given in evidence in any action against executors or administrators, to prove the value of the estate; but shall not be conclusive, if it shall appear, on a trial of the cause, that the estate was really worth, or bona fide sold for more or less than such appraisement. § 13, *No. 1582, p. 492, Pub. Acts.*

29. When it shall be requisite to make sale of any part of the personal estate of testators or intestates, either for a division, payment of debts, or to prevent the loss of perishable articles, application shall be made to the court of the county, or ordinary, as the case may be, where the will was recorded or administration granted; whereupon such court may refuse or grant such order for sale, regulating the *time, place, and credit* to be given, in such manner as to do impartial justice to all persons interested therein. § 19, *No. 1582, p. 493, Pub. Acts.*

30. Every executor or administrator who shall not, within 90 days, or within such further or reasonable time as the ordinary shall think fit to give, make and return into the secretary's office, such inventory and appraisement as is herein before directed to be made and returned, and who shall make default in mentioning and inserting therein all or any of the credits or effects of his testator or intestate, which came into his hands to be administered, shall be chargeable with, and subject to the payment of all and singular the said testator or intestate's debts, legacies or bequests, in the same manner as executors of their own wrong are subjected and made chargeable by the common or statute law of England. § 10, *No. 748, p. 202, Pub. Acts.*

If any executor or administrator, with the will annexed, having
power,

power, under the will, to dispose of the estate, or any part thereof, shall take such security as shall clearly be proved to be insufficient at the time; such executors or administrators, and their securities, shall be liable to make good any loss or damages that the legatees or creditors may sustain; to be recovered by action on the case against such executors, or by action of debt on the bond of such administrators, and their security, wherein such damages shall be assessed by the verdict of a jury. § 19, No. 1582, p. 493, *Pub. Acts.*

Every executor or administrator of any executor or administrator of right, who shall waste, or convert to his own use, the goods, chattels or estate of his testator or intestate, shall be chargeable in the same manner as his testator or intestate should have been. § 12, 4 and 5 *W. and M. c. 24. P. 14, Appendix, Pub. Acts.*

31. If any person shall, by will, appoint his debtor to be his executor, such appointment shall not in law or equity be construed to be a release or extinguishment of the debt, unless the testator shall, in his will, expressly declare his intention to release the same. § 25, No. 1582, p. 494, *Pub. Acts.*

32. Every executor or administrator shall give 3 weeks notice, by advertisement in the State Gazette, or at 3 different places of the most public resort in the parish or county, for creditors to render in an account of their demands; and they shall be allowed 12 months to ascertain the debts due to and from the deceased, to be computed from the probate of the will, or granting letters of administration; and creditors neglecting to give in a state of their debts within the time aforesaid, the executors or administrators shall not be liable to make good the same; nor shall any action be commenced against any executor or administrator for the recovery of the debts due by the testator or intestate, until 9 months after such testator or intestate's death. § 27, No. 1582, p. 494, *Pub. Acts.*

33. If any executors, administrators, guardians, or trustees, who shall have had extraordinary trouble in the management of the estates under their care, shall not be satisfied with the sums herein before mentioned, they may bring actions in the common pleas for their services; and the verdict of the jury, and judgment of the court thereupon, shall be final and conclusive; provided no verdict shall be given for more than £ 5. per cent. over and above the sums allowed by this act. § 12, No. 748, p. 205, *Pub. Acts.*

Every executor or administrator shall, for his care, trouble and attendance in the execution of their several duties, take, receive or retain in his hands a sum not exceeding the sum of 50s. for every £ 100. which he shall receive; and the sum of 50s. for every £ 100. which he shall pay away, in credits, debts, legacies or otherwise, during the continuance of their management or administration; and so in proportion for any sum less than £ 100. *Provided* that no executor or administrator shall, for his trouble in letting out any monies upon interest, and again receiving the same, be entitled to retain any sum exceeding 20s. for every £ 10. for all sums arising by monies let out to interest, and in like proportion for a larger or a lesser sum; nor shall any executors or administrator who may be creditors of any testator or intestate,

tate, or to whom any sum of money or other estate may be bequeathed, be entitled to any commissions for retaining to themselves any such debts or legacies. § 29, No. 1582, *Pub. Acts.*

The commissions given by this act shall be divided amongst executors or administrators, in proportion to the services by them respectively performed; to be rated and settled by the justices of the county court who granted probate of the will or letters of administration, or the ordinary of the district, as the case may be, if the executors or administrators cannot agree among themselves concerning the same. § 30, No. 1582, *Pub. Acts.*

34. If the executor die intestate, the testator also, from that time, shall be deemed intestate; and administration may be committed, in this case, of the goods not administered. *Swin.* 382. *1 Roll's Abr.* 907.

But if the executor maketh an executor and dieth, his executor shall be executor to the first testator, in case there be no executor. *Swin.* 329.

And if the executor of an executor assume the administration of the first testator's goods, he cannot afterwards refuse the administration of the goods of the latter testator; but he may accept the latter, yet refuse the former. *T. 17 J. Wolfe and Heyden.* *Hutt.* 30.

But an executor's executor shall not be admitted to administer the goods of the first testator, where the first executor refused to administer, or died before probate; unless the residuum bonorum, after the debts paid, be given by the will to the first executor. *Dyer,* 372.

E. 4 and 5 P. and M. Two executors, one of them proved the will, the other refused before the ordinary, who thereupon granted administration to the other, who made his executor, and died; and that executor alone brought an action of debt, for a debt due to the first testator: and adjudged, that the action did lie; for though he who refused might administer at any time, yet it must be in the life-time of his companion; and he being dead, that election is gone. *Dyer,* 160.

Where any executor or administrator shall die intestate, not having fully administered, the same court by whom the former probate or administration was obtained, shall determine the right, and grant letters of administration of the estate so unadministered. § 15, No. 1582, *Pub. Acts.*

CHAP. VIII. *Of the Administration of Intestates' Effects.*

HAVING already treated of the administration of intestates' effects, as far as the same respects the jurisdiction and process of the ordinary, letters of appraisement, and the inventory, the sales of the goods and chattels of a deceased person, and the commissions allowed by law to those who have the management of the estate; I shall proceed to shew,

1. That, before the statute of 13 Ed. 1. stat. 1. c. 19. the ordinary had the absolute disposal of intestates' effects. *2 Bac. Abr.* 398.

This statute obliges the ordinary to answer the debts of the intestate person, as far as his goods extended, in the same manner as the executors would

would have been bound, had he made a testament: and this act extended as well to such persons as died intestate, as to those who left wills, but whose executors refused qualifying upon them, since they died *quasi intestatus*. 2 *Ins.* 397.

The clergy formerly were the administrators of the goods and chattels of persons dying intestate; but now they are obliged to grant administration in the order established by § 16 of the act of 1789. No. 1582, p. 492, *Pub. Acts.*

Administrators are now put upon the same footing, with regard to suits, and to accounting, as executors appointed by will. 2 *Black. Com.* 496.

The ordinary now has no exclusive right of taking into possession the effects of deceased persons; but he is obliged to grant administration to some person who applies for the same.

But the ordinary may administer himself on the effects of any deceased person; or he may qualify as executor to any testator. For it is enacted, "that the ordinaries of Charleston, Georgetown, and Beaufort districts, when respectively appointed executors of the last will and testament of any person deceased, within their several jurisdictions, and shall choose to take on them the burthen and execution thereof, they shall prove such last wills and testaments, and qualify as executors thereof, before one or more of the judges of the court of common pleas, either during term time, or vacation; and in cases where the said ordinaries respectively may seek or require administration of the goods, chattels, rights or credits of any person dying intestate within their several jurisdictions, or administration, with the will annexed, any one of the judges of the common pleas, in term time, or during the vacation, may have cognizance and jurisdiction of, and determine respecting the same, and grant letters of administration, if the said ordinaries should be thereunto respectively entitled; and take bond for due administration, and have and do all other acts and proceedings thereto incident." No. 1557, p. 472, *Pub. Acts.*

2. If administration is denied by the ordinary, to the person who is entitled to it, a mandamus will go from the temporal courts to grant it; except a controversy is depending, whether there is a will or not; for then (as Holt chief justice said) suppose the will should prove good, what will the granting of administration signify? *Gibs.* 478.

H. 3 G. 2. K. and Bettesworth. In the case of a will, a mandamus was granted to Dr. Bettesworth, as judge of the prerogative court of Canterbury, to grant probate of the earl of Londonderry's will, to the executors therein named. The doctor returned, that it was the custom and practice of the prerogative court, that if any creditor of the deceased enters a caveat against granting probate, and swears himself to be a creditor, there goes out a commission of appraisement, till the return whereof the judge hath not used, nor ought to grant any probate; then he sets out, that two creditors, who swore to their debts, entered a caveat, and prayed a commission of appraisement; which was decreed and issued, but is not yet returnable; and for that cause he cannot as yet grant a probate. Upon argument, the court held the return to be

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ill; for that the judge can only stay the probate, where there is a contest about the validity of the will. This commission of appraisement can be of no use but to spend money, and delay the executor from getting in the effects of the testator. And a peremptory mandamus was granted. *Str.* 857.

H. 4 G. 2. Smith's case. It was moved for a mandamus to Dr. Bettesworth, commanding him to grant administration to Smith, of the goods of his deceased son, during the minority of his grand-son. Against this it was insisted, that a father hath not an equal right with the son: and that the spiritual court hath always considered these administrators only as trustees for the infant, and have never kept to any rule in granting them, but according to the circumstances in the family: where there are several in equal degree, as children, they have always chosen which they pleased. And by the court, *when we grant a mandamus, it is to oblige the judge to do right to the party who sues the writ; but as there is no law which says to whom these administrations, during minority, shall be granted, there is no law to be put in execution.* In the case of the next of kin, he is entitled de jure, and therefore in this case we grant a mandamus of course. We will grant no mandamus in the present case. *Str.* 892.

This case, as cited by 1 Barnard, 370, 425, gives as a reason why the spiritual court refused the administration to Smith was, that he would not consent to give security to distribute the effects in equal proportions amongst the creditors: the court were there of opinion, that the ordinary had a discretionary power in granting administration durante minori ætate, and therefore he might insist upon reasonable terms, or refuse administration.

M. 7 G. 2. K. and Bettesworth. John Kynaston, Esq. made his will, and two persons executors, and left the residue of his personal estate to his youngest son Edward. The executors renounced: and the residuary legatee moved for a mandamus to be admitted to prove the will, and have administration with the will annexed. And a rule was made to shew cause. On shewing cause, it was insisted, that this case differed from lord Londonderry's, where the commission of appraisement was set up against the immediate grant of the probate, which the statute of the * 21 H. 8. c. 5. requires shall be without any frustatory delay; and the ordinary hath no election there: whereas in the present case, he is not bound to grant the administration to the residuary legatee, none of the statutes mentioning him; on the contrary, the statute of the * 21 H. 8. c. 5. which takes notice of the renunciation of executors, leaves the matter to the election of the ordinary. And of this opinion was the court; who said, if the commission of appraisement was a grievance, it would be proper matter of appeal, but they could not break into the practice of the court below. And lord Hardwicke mentioned a case in chancery before lord Macclesfield, between Wheeler and the archbishop of Canterbury, where it was held, that these sort of administrations are not within the statute of distribution; which brings it to Smith's case, where a mandamus to grant administration during the minority of an executor to the fa-

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* Not in force here.

ther of the executor, was refused; because there was no law obliging the spiritual court so to do. And the rule for a mandamus was discharged. *Str.* 956.

H. 4 G. 2. K. and Bettesworth. Mandamus to grant administration to *John Cullom*, of Joan his wife. Return; that by articles before marriage it was agreed, that the wife should have power to make a will, and dispose of her leasehold estate; that pursuant to this power, she made a will, and her mother executrix, who hath duly proved the same. To this return it was objected, that she might have things in action not covered by the deed, and the husband was in all events entitled to an administration as to them. Which was agreed to by the court; and a peremptory mandamus was granted. *Str.* 891.

T. 12 G. 2. K. and Bettesworth. Mandamus to grant administration to Mr. Bridgen, husband of the late lady Bellamont, deceased. The dean of the arches returned, that a suit had been commenced before him, between Mr. Bridgen and a son of the deceased, who claimed to be her executor, under a will made by her, pursuant to a deed executed before marriage, whereby the husband agreed she should have power to make a will, and dispose of her estate; which deed Mr. Bridgen had confessed, and thereupon sentence had been given for the validity of the disposition, but not for any executorship created thereby: and thereupon a new suit was instituted by the daughter against the son and Mr. Bridgen, for administration, with the will annexed; which is still depending. And upon consideration the court declared, that no pre-emptory mandamus ought to go: for though generally the husband is entitled to the administration as next of kin; yet that is in respect of the interest he has in the estate, and because no body is in equal degree: and that is the reason why administrations are so often granted to a residuary legatee: and though strictly speaking this is no will, but rather an appointment which is to operate in equity, yet the true question is, whether this is such an intestacy as is within the meaning of the statute. And the law, particularly the * 29 C. 2. c. 3. considers *femes-covert* as having some right to dispose of their effects, which can only be by the agreement of the husband, which appears in this case; and this differs greatly from the case of *Cullom*, where the power was only as to a leasehold estate, whereas she might have other effects. The matter is properly under the consideration of the spiritual court to whom to grant the administration, and there is no reason for us to interpose; and therefore the return must be allowed. *Str.* 1112.

But the act of assembly of 1789, has established the following principles: That when any person shall make a will in writing, without appointing any executor therein, or such executor should refuse to qualify, the court where such will shall be proved shall grant letters of administration, with the will annexed, to such person as would have been entitled thereto, if the deceased had died intestate: and if any person shall die intestate, the court of the county, or the ordinary of the district where there are no county courts, where the will of such person, had he or she left one, would have been proved, shall grant letters

* In force here, p. 32, Pub. Acts.

ters of administration to them who shall be entitled thereto. § 11, No. 1582, p. 492, *Pub. Acts.*

3. The person to whom administration is granted, may refuse to take it upon him if he will; for the ordinary hath not power to compel him to accept it. *Swin.* 384.

4. By the statute of * 31 Ed. 3. stat. 1. c. 11. *In case where a man dieth intestate, the ordinary shall depute the next and most lawful friends of the deceased, to administer his goods.*

The ordinary shall depute] Before this statute, the ordinary was not compellable to grant administration; but now, by this act, he is commanded, and thereby compellable to grant administration. 9 *Co.* 40.

To the next and most lawful friends] Before this act, the ordinaries might have granted administration to whom they pleased; but hereby they are restrained to the next and most lawful friends. 9 *Co.* 40.

Most lawful friends] That is, to the next of blood, who are not attainted of treason, felony, or have other lawful disability. 9 *Co.* 40.

As, by the 9 and 10 *W. c.* 32. Persons denying the Trinity, or asserting that there are more gods than one, or denying the christian religion to be true, or the holy scriptures to be of divine authority, shall, for the second offence, be disabled to be administrators.

If a *bastard* dies intestate, without wife or issue, leaving a personal estate; in such case, the king shall be entitled, and the ordinary shall grant administration to the king's patentee. 3 *Peere Will.* 33.

In case any person die intestate, or the executors refuse to qualify, then the justices of the county court, or the ordinary of the district, having the right, shall grant administration of the goods of the person deceased, to his relations, in the order following, *in exclusion of all other persons*; to wit: 1st. To the husband or wife of the deceased; and if there be none such, or they do not apply, then to the child or children, or their legal representatives; if none such apply, then to the father or mother; in default of them, to the brothers or sisters; in default of them, to such of the next of kindred of the deceased, at the discretion of the justices of the county court, or ordinary, as the case may be, as shall be entitled to a distributive share of the intestate's estate; and in default of such, to the greatest creditor or creditors, or such other person as the court shall appoint. § 16, No. 1582, p. 492, *Pub. Acts.*

This act, therefore, leaves very little in the discretion of the ordinary, and has abridged the power he formerly possessed under the 31 Ed. 3. stat. 1. c. 11; so that now he can make no election to whom he will commit administration: as in *Stra.* 552: neither can he join the next of kin to the widow of the deceased, in the letters of administration: as in 1 *Roll's Abr.* 908: neither can he sever the administration, granting part thereof to one and part to another, as is laid down in 1 *Salk.* 36: that is, where the act of 1789 has given a decided priority.

5. The statute of 29 *G. 2. c.* 3. enacts, that the 22 and 23 *C. 2. c.* 10. concerning the distribution of intestates' effects, shall not extend to the estates of feme-coverts that shall die intestate; but that their husbands may demand, and have administration of their rights, credits, and

* In force here, p. 35, *Pub. Acts.*

and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act: and the last recited act of assembly re-enacts the same, vesting the right of administration of the wife's effects in the husband.

And if the husband die before administration taken by him, his executors or administrators, and not the wife's next of kin, shall be entitled in equity. 1 *P. Will.* 381.

As in the case of *Elliot and Collier*, July 1, 1747: One question in the cause was, Whether the husband dying without administering to the personal estate the wife had in her own right, it shall go to the next of kin of the wife, or to the representative of the husband. By lord Hardwicke: The representative of the wife has no right to an account of her personal estate. That point doth not follow barely the legal right of administration; for though the ecclesiastical court are bound by act of parliament to grant the administration to the next of kin to the wife, yet that doth not bind the right in this court. For the husband surviving the wife, her whole estate vested in him at the time of her death. There are several cases where it has been held, that though the ecclesiastical court are bound to grant administration by * 31 *Ed.* 3. c. 11. yet those persons have been looked upon in this court as mere trustees. Suppose the wife had survived the husband, only such part of her personal estate as had continued *choses in action*, would have survived to her; for whatever he had reduced into possession, would have been the husband's. Upon the equity of the statute of distribution, this court makes an *administrator de bonis non* only a trustee for such part of the testator's personal estate as is undisposed of, for his next of kin. Therefore, I am of opinion, the husband's representative is entitled to the wife's personal estate, and that it vested in the husband before administration was taken out. 3 *Atk.* 526. 1 *Wils.* 168.

But if the wife was executrix to another, then, as to the goods which she had in that capacity, administration must be granted to the next of kin to the testator. 3 *Salk.* 21.

6. If one dies intestate, leaving a grand-mother and uncles and aunts; the grand-mother is entitled to the administration, in exclusion of the uncles and aunts. *Pre. Cha.* 527.

7. The half blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate. *Lovelass*, 4.

Administration must be granted to the brother of the half blood before the uncle; for he has the immediate blood of the father, which the uncle hath not. 1 *Ventr.* 425.

Administration must be granted to the brother of the half blood before the uncle of the whole blood; and to the sister of the half blood, or the brother of the whole blood, at his own discretion. 2 *Black. Com.* 505.

And the half blood in this respect is esteemed as near as the whole. But if there is a brother, and a sister of the half blood, and the sister is married; then it must be granted to the brother, and not to her and her husband; because in effect it makes the husband administrator, who is not of kin to the intestate: and if she die, the husband would still

* In force here, p. 35, Pub. Acts.

still continue administrator, and so might possess himself of the whole personal estate. 3 *Salk.* 21.

8. Whereas it hath frequently happened, that persons who have obtained letters of administration on suggestion that they have been principal creditors to the intestate; and when they have received sufficient assets of the intestate to satisfy their own debts, have deserted the administration, or have neglected the recovery of the rest of the rights and credits of the intestate, which such administrators ought to have applied towards satisfaction of the rest of the creditors of the intestate; the more effectually to prevent the like in future, *be it enacted*, that no letters of administration shall be hereafter granted by the ordinary to any person whomsoever, as principal creditor to any intestate, but upon special trust and confidence, and for the benefit of all the rest of the creditors. § 8, No. 748, p. 202, *Pub. Acts.*

When a person applies for administration as principal creditor, if there are no relations who can be preferred agreeable to the 16 § of the act of 1789, he is not obliged to swear to the debt, nor the amount thereof, unless some other person should, at the same time, advance his pretensions to the administration as principal creditor also: in which case it would be necessary that they should prove their debts to the satisfaction of the ordinary, either by oath or otherwise, that he might with more propriety determine to which of the applicants he should grant it.

9. If there is any fraud in the administration, a creditor may have relief upon the statute of the 13 Eliz. c. 5. *Co. Rep.* 19.

And as it hath often been the case, to the defrauding of creditors, that such persons who were to have the administration of the goods of others dying intestate, committed unto them, if they required it, would not accept the same, but suffered or procured the administration to be granted to some stranger, of mean estate, and not of kin to the intestate; from whom themselves, or others, by their means, took deeds of gift and authorities by letters of attorney, whereby they obtained the estate of the intestate into their hands, and yet stood not subject to any debts by him owing: it is enacted, that every person who shall obtain any goods or debts of any person dying intestate, upon any fraud, as is above-mentioned, or without such valuable consideration as shall amount to the full value of the same goods or debts, or thereabouts, (except it be in satisfaction of some just and principal debt, of the value of the same goods or debts to him owing by the intestate,) shall be charged as executor of his own wrong, so far as such goods and debts will satisfy. 43 *Eliz. c. 8. P. 72, Pub. Acts.*

10. There are also other administrations, which are not within the statutes aforesaid: As administration during absence out of the kingdom. Concerning which, in the case of *Clare and Hedges, E. 3 W.* it was held clearly by the court, that such administration is grantable by law, and that it may be a great conveniency so to do; for if the next of kin be beyond sea, and such administration could not be granted, the debts due to the intestate might be lost. 1 *Lutw.* 342.

And in the case of *Slater and May, M. 3 An.* Holt chief justice said, that it was reasonable there should be such an administrator, and that

that this kind of administration stood upon the same reason as an administration during the minority of an executor; namely, that there should be one to manage the estate of the testator till the person appointed by him is able. 2 *L. Raym.* 1071.

11. Also, administration pending a suit; or, if there be no controversy, then until the executor comes in; which, as well as the last before-mentioned, do fall of course, as soon as the consideration ceaseth upon which they were first granted. *Gibbs.* 574. 2 *Bac. Abr.* 415. 2 *P. Will.* 576.

Nov. 23, 1749; *Knight and Duplessis.* The heir at law brought a bill to controvert the will, and moved for an injunction to stay the defendant from receiving the personal, or the rents and profits of the real estate, and to have a receiver appointed, on the ground that there was a dispute in the ecclesiastical court concerning the probate; which not being yet granted, there was none to get in the debts; therefore, this court should appoint a receiver; and as to the real estate, the tenants will not pay the rents to any of the contending parties, so that they are in danger of being lost. By lord Hardwicke: This is a very early motion for a receiver; and no ground for it; not the least colour as to the personal estate. For if the litigation in the ecclesiastical court is likely to be long, the court has jurisdiction to grant administration *pendente lite*, which administrator may maintain an action to recover the debts, whereby no loss can be to the personal estate. Nor is there any rule, that on a dispute in the ecclesiastical court concerning a probate, this court should appoint a receiver of the personal estate. *Vezey*, 324.

12. An infant, how young soever he be, may be executor; yet the execution of the will shall not be committed unto him until he attain the age of 17 years; for administration granted durante minori etate ceaseth when the infant executor attains to that age of 17 years. *Swin.* 331.

And Dr. Swinburne says, If it be a female infant, and married to a man of 17 years of age or more, it is then as if herself were of that age, and her husband shall have the execution of the will and administration thereof. *Swin.* 331.

And in *Prince's* case, 5 *Co.* 29. it is said to have been adjudged, that if administration is granted during the minority of a woman, and she takes a husband of age, the administration ceaseth: for that she hath a husband who may administer as executor.

But in the case of *Jones and the earl of Strafford*, *M.* 1730. it was determined, that where administration is granted during the minority of an infant executrix under 17, and she marries an husband of full age; this doth not determine the administration. By King lord chancellor, and Raymond chief justice. 3 *P. Will.* 88.

But although an administration during the minority of an infant executor ceaseth at his age of 17 years; yet an administration during the minority of an infant administrator ceaseth not until his age of 21. As in the case of *Freke and Thomas*, *E.* 13 *W.* Debt upon bond brought by an administrator during the minority of an administrator. Upon demurrer to the declaration, exception for the defendant was taken, that it appeared upon the declaration, that he, during the minority of whom

whom administration was granted to the plaintiff, was above the age of 17; and so the administration determined, that this case doth not differ in reason, from the case of an administrator during the minority of an executor, which determines at the age of 17; nor from the case where a woman executrix, under the age of 17, marries a husband above the age of 17: for the only thing that the law considers, is the ability of the person to administer the estate of the dead, who ought to have the administration of it, which ought to be the same in both cases; and in *Vaugh.* 98, the rule of averment of the age of an administrator or executor to be under 17, is equally put to both; and the statute of distribution will make no difference, because an infant may find sureties, though he cannot be bound himself. But not allowed: For by Holt chief justice, there is a difference between administration during the minority of an executor, and of another person; for an administrator, during the minority of a residuary legatee, ought to be understood to be during his legal minority. For the authority that the administrator hath, is given to him by the statute; and an infant hath not been adjudged a legal person to be intrusted with the management of an estate. But an executor, who comes in by the act of the party himself, hath been adjudged capable to administer at 17. But the law in the exposition of a statute will not make such construction. And care is taken of the administration, by the commission of administration during his minority to his next friend. And this is the opinion of the civilians, and it hath been held accordingly by the commissioners delegate. And therefore judgment was given for the plaintiff. *L. Raym.* 667.

And this is by construction of the statute of distribution, which requireth that the administrators shall enter into bond. *1 Salk.* 39. And the like was determined in the case of *Atkinson and Cornish*, *E. 10 W.* *L. Raym.* 338. And afterwards, in the case of *Edmund and Shaler*, *T. 7 An.* wherein this distinction was taken, that the age of 17 years, allowed to be the age when an executor may take the executorship upon himself, is in conformity to the *spiritual* law, which allows an infant of 17 years to be a proctor or agent for another; but *administration* is granted by the authority of the statute of the *31 Ed.* 3. and therefore the person who has administration granted to him ought to be capable by the *common* law, by which the legal age is 21, and consequently administration granted to another during his minority, does not determine till his age of 21 years. *Comyns*, 159.

If an action be brought by an administrator during the minority of an executor, he must aver, that the executor is within the age of 17 years, otherwise it is an error; but if an action be brought against such an administrator, there need no such averment, because the plaintiff is a stranger to the defendant's power. *H. 13 J.* *Carver and Haslerigg.* *Hob.* 251.

There were 2 executors, and one of them was an infant; and whether he must be joined in the action with the other as plaintiff, was the question: It was objected that he must not, because an infant cannot make a warrant of attorney; and if he could, he cannot instruct him. Adjudged, they may both sue by their attorney, because they both represent

represent the person of the testator, and sue in the right of another; and therefore the infant must be joined with the other. *Foxwith and Tremain. H. 21 and 22 C. 2. 1 Mod. 47. 1 Sid. 449. 1 Ventr. 102.*

Where administration is granted during the minority of divers executors, he that comes first of age shall prove the will, and the administration ceaseth. *Law of Test. 473, 474.*

So, if one maketh 2 executors, one of the age of 17, and the other under; administration during the minority of him that is under age is void: because he that is of the age of 17 may execute the will. *1 Brownl. 46.*

And it is said, that the ordinary may grant administration during the minority of an infant to whom he pleases; for the next of kin, in respect to administrations, only concerneth the infant, and not the person who is employed for the infant until he comes of age. *Fitz-Gibb. 163. Barnardist. Cha. Ca. 22.*

So, in the case of *K. and Bettsworth, M. 4 G. 2.* a mandamus was moved for, to be directed to the judge of the prerogative court, to grant administration to one *Smith*, during the minority of his 2 infant grand-children. The judge had approved of him as a proper person, but insisted on his giving security to distribute the effects in equal proportions amongst the creditors. The court were of opinion, that the judge had a discretionary power in granting administration *durante minori etate*, and therefore, that in this case he might insist upon reasonable or equitable terms, or otherwise refuse administration to the claimant. But they said, if a mandamus had been moved for, to grant administration generally, they would have granted it. *1 Barnard. 370, 425.*

When the right of administration devolves upon an infant, the ordinary is to grant administration till he arrives at the age of 21; because an infant cannot, before his full age, give bond to the ordinary faithfully to administer. *Godolph. 102. 5 Co. Rep. 29.*

And as such an administration is but in nature of a curator for the infant, and has no interest or benefit in the intestate's estate, but in right of the infant; it has always been held discretionary in the ordinary to whom to grant it. *Hob. 251. 1 New Abr. 381.*

13. If a feme-covert, as next of kin, hath a right to administer, the administration ought not to be granted to the husband and wife; for then, if she should die before him, he would continue administrator, against the meaning of the act. *Brown and Wood. H. 23 Car. Aleyn, 36. Style, 74, 75.*

But it was said, that if it had been granted to them only during the coverture, perhaps it might be good; because, if granted to the wife only, the husband might, during the coverture, have administered. *Aleyn, 36.*

If the wife, as residuary legatee, hath a right to take administration, but refuseth, and prays it may be granted to another, and not to her husband; yet it may be granted to her husband. *Vanthienen's case. Fitz-Gibb. 203.*

14. If an administrator die, his executors are not administrators, but it behoveth the ordinary to commit a new administration. *1 Roll's Abr. 907.*

Where

Where administration is granted to 2, and one of them dies, the administration surviveth to him who is living. *Hudson and Hudson, T. 1735. Cas. Talb. 127.*

15. If none of the kindred will take administration, then it shall be granted to those who shall desire it: And if none will take the administration, the ordinary may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands, where-with he is to pay debts and legacies, so far as the goods will reach; for which himself becomes liable in law, as other executors or administrators. *Swin. a. 448.*

16. Letters of administration are not of necessity to be granted within the limits of the jurisdiction; the granting thereof being not a judicial, but a ministerial (and therefore not a local) act; wherein the bishop acts as a person designed and appointed by the law. *Gibs. 478.*

17. But an administrator cannot act before letters of administration granted to him. *1 Salk. 301.*

But he may bring a bill in chancery; though this would be an exception in an action at law. *Barnardist. 320.*

18. The practice is, not to issue letters of administration, until after the expiration of 14 days from the death of the intestate, unless for special cause (as that the goods would otherwise perish, or the like,) the judge shall think fit to decree them sooner. *1 Ought. 323, 324.*

The general rule in Charleston district is not to apply for probates or letters of administration until after the expiration of 7 days from the interment of the deceased: and the usual day on which such applications are made is Friday; but the ordinary, in particular cases, grants probates, &c. in a shorter period, and upon any other day in the week, Sundays excepted.

19. You, A B, do swear, that you will produce to, shew and inform the appraisers that shall be appointed by the ordinary, all and singular the goods and chattels of the said C D, deceased, as already have, or shall, before the day of making the appraisement, come into your hands, possession or knowledge. *A. A. 1745.*

Every administrator shall, in open court, when letters of administration are granted to him, take the following oath or affirmation, as the case may be; to wit, *I do solemnly swear or affirm, that A B, deceased, died without any will, as far as I know or believe; and that I will well and truly administer all and singular the goods, chattels, rights and credits of the said deceased, and pay all his just debts, as far as the same will extend, and the law requires me, and that I will make a true and perfect inventory of all said goods and chattels, rights and credits, and return a just account thereof when thereunto required: So help me God.* § 21, No. 1582, p. 493, Pub. Acts.

20. By the statute of the 22 and 23 C. 2. c. 10. *All ordinaries shall and may, upon their granting and committing of administrations of the goods of persons dying intestate, of the person or persons to whom any administration is to be committed, take sufficient bond, with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary.* P. 81, Pub. Acts.

And such administrator shall also enter into bond, with good secu-

rity, to be approved by the court, in a sum equal to the full value of the estate, with the condition following: "The condition of the above obligation is such, that if the above bound A B, administrator of the goods, chattels and credits of C D, deceased, do make a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession, or knowledge of the said A B, or into the hands or possession of any other person or persons for him; and the same so made do exhibit into the said court of —, when he shall be thereunto required; and such goods, chattels or credits do well and truly administer according to law; and do make a just and true account of his actings and doings therein, when required by the said court; and all the rest of the said goods, chattels and credits, which shall be found remaining upon the account of the said administration, the same being first allowed by the said court, shall deliver and pay unto such persons respectively as are entitled to the same by law; and if it shall hereafter appear, that any last will and testament was made by the said deceased, and the same be proved in court, and the executors obtain a certificate of the probate thereof, and the said A B do, in such case, if required, render and deliver up the said letters of administration, then this obligation to be void, or else to remain in full force."

The form of this bond is nearly copied from the one contained in 22 and 23 C. 2. c. 10.

21. This bond shall be made payable to the justices of the county court, and their successors, and recorded in the clerk's office, or to the ordinary of the district, as the case may be; and may be sued in like manner as is prescribed in the case of bonds given by administration with the will annexed. *Id.*

H. 6 An. Archbishop of Canterbury and Willis. The condition of the bond, as to administering truly according to law, is to be intended in bringing in his account, and not in paying the debts of the intestate; and therefore a creditor shall not take an assignment of the bond, and sue it, and for breach assign non-payment of a debt to him, or a devastavit committed by the administrator; for that would be endless. 1 Salk. 316.

June 28, 1745; *Greenside* and others, against *Benson* and others. The plaintiffs were two sureties with the defendant, *Mrs. Hudson*, in an administration bond given to the commissary of York, for her bringing in a true and perfect inventory of the intestate's effects. The defendant, *Mrs. Hudson*, did afterwards exhibit an inventory in the spiritual court of York. The defendant, *Benson*, being a creditor of the intestate, by bond, in the penalty of £600. brought an action against the defendant, *Mrs. Hudson*, upon that bond, and she pleaded that she had not assets above £54. which she paid into court. The defendant, *Benson*, not being satisfied with the inventory brought in by her, procured the commissary (by indemnifying him) to assign the administration bond to him, and he put it in suit by bringing three several actions, one against her, and one against each of the sureties; and assigned for breach of the bond, that she had not exhibited a true and perfect inventory. These causes came on to be tried, and on the trial no defence was made; and there was judgment for the plaintiff by

by default. A bill was brought against the defendant, *Benson*, insisting that he, as a creditor, had no right to put the bond in suit against the sureties, and prayed an injunction to stay the proceedings at law. And for this was cited the case of the *archbishop of Canterbury and Willis*.—By the lord chancellor *Hardwicke*: There is no doubt but the archbishop's commissary may assign a breach in not delivering a true and perfect inventory, and even without citation, and nothing else appears at law; and there must have been a judgment for the ordinary, because no doubt there was a breach in not exhibiting such an inventory. What the counsel for the plaintiffs and for *Mrs. Hudson* aim at would have been right, supposing the commissary had assigned for breach the non-payment of the creditor's debts. The ecclesiastical court understand no more by an account than some account in nature of an inventory, and depends only upon the particular wording of inventories by administrators. The ordinary, after an administrator has exhibited an inventory, cannot compel the administrator to account; but it must be at the instance of the party; and therefore the inventory and account are, as to the ordinary, the same thing. What the defendant, *Mr. Benson*, asks is, that this bond, upon which the penalty is recovered, may stand only as a security for what is justly due to the creditor. The administratrix to be sure cannot now dispute the verdict, which finds she did not administer the whole assets, and she is bound by a verdict which has unravelled a matter; and it is no excuse to say that the verdict was without defence of the administratrix, for that is rather a consciousness that she had no defence. Therefore the court will not think it proper to have the whole account taken over again, or to alter what has been found by the verdict. The case of the sureties is not at all better: for, as the verdict was obtained against the administratrix, who was the proper person to try it, it would be hard to have this tried over again in as many actions as the plaintiffs please. His lordship ordered an account to be taken only of what was exhibited upon the inventory, and the verdict to stand as a security for so much as that should fall short to satisfy the defendant's principal and interest on his bond. 3 *Atk.* 248.

T. 13 G. 2. Folkes and Dominique. The plaintiff declares, on bond in the *detinet*, against the defendant as administrator, during minority, with the will annexed. And, upon oyer, the condition appears to be, for exhibiting an inventory and duly administering, by paying debts and legacies. The performance of all which the defendant avers. The plaintiff replies, that he had not paid a legacy of £1500. though he had more than sufficient to pay all the debts; to wit, £500. And on demurrer it was objected, that this was a void bond, not warranted by the statute of the * 21 *H. 8. c. 5.* (nor by the statute of the † 22 and 23 *C. 2 c. 10.* for neither of those statutes extendeth to administrators during the minority of an executor) nor yet by the common law; for that it requireth the administrator to pay legacies according to the ecclesiastical decision, and shall be taken to be obtained by coercion. On the contrary, it was argued, that this not being on an intestacy

* Not in force here.

† In force here, p. 81, Pub. Acts.

testacy (nor in case where an executor refuseth) is not within the statutes it is true; but it is to be supported as a reasonable bond taken by the course of the ecclesiastical court. And though formerly it was disputed, yet it is now settled, that they may compel distribution: that here the breach is assigned in non-payment of legacies, of which they have undoubted jurisdiction: and if it be good in any part (being a bond at common law) it is enough. And it differs from the case where part of the condition is against a statute, for there it is void in toto. And by the court: These administrations are not within the statutes; and therefore we deny a mandamus: we must therefore consider it as a bond at common law; and then it is sufficient if it be good in that part on which the breach is assigned, as we think this is, and we cannot take it to be a bond by coercion. Therefore the plaintiff must have judgment. *Sir.* 1137.

22. If the justices of the county court who were present at the time of granting letters of administration, or the ordinary of the district, shall fail to take bond and security aforesaid, such justices or ordinary shall be liable to be sued for all the damages arising from such neglect, by any person interested in the estate. § 21, *No.* 1582, *p.* 494, *Pub. Acts.*

23. If the securities for administrators conceive themselves in danger of being injured by such suretyship, they may petition the court, to whom they stand bound, for relief; which court shall summon the administrator to appear, and thereupon make such order or decree as shall be sufficient to give relief to the petitioner. § 24, *Id.*

24. The plaintiff could not produce any letters of administration; yet, to prove himself administrator, he produced the book of the spiritual court, wherein there was an order entered, that administration shall be granted to him; and this was allowed to be good evidence. 1 *Lev.* 101. *Peasly's case.*

And by the 4 *An. c.* 16. No advantage or exception shall be taken, for the default of alledging the bringing into court any letters of administration; but the court shall give judgment according to the very right of the cause, without regarding such omissions and defects, except the same shall be specially and particularly set down and shewn for cause of demurrer. *No.* 331, *p.* 94, *Pub. Acts.*

25. The ordinary cannot repeal an administration at his pleasure. *Swin. a.* 381.

H. 15 and 16 *C.* 2. *Sands's case.* Sir George Sands administered to his son, and afterwards a woman, pretending to be his wife, sued for a repeal, but a prohibition was granted; because the ordinary had an election to grant it either to the father or wife, and had executed his power by granting it to the father. *Raym.* 93.

But where a feme-covert died intestate, and the next of kin to her obtained administration, and the husband sued for a repeal, a prohibition was denied; because, in this case the ordinary had no power or election to grant it to any person but to the husband. 3 *Salk.* 22.

And the rule seemeth to be, that an administration may be repealed, although not arbitrarily, yet where there shall be just cause for so doing; of which the temporal courts are to judge; as, if the administrator should

should become lunatic, or the like. So if the next of kin, at the time of the death of the intestate, happen to be incapable of administering, by reason of attaint, &c. and the ordinary commits it to another; if he afterwards becomes capable, the ordinary may repeal the first administration, and commit it to the next of kin. *Gibs.* 479.

And the same thing is much more to be said, where the administration was undue ab initio, whether as granted to other than the next of kin, or granted by an incompetent authority, or in an irregular manner, without citing those who ought to have been cited. *Gibs.* 479. 2 *Bac. Abr.* 410.

T. 5 G. 2. Harrison and Weldon. Walker Weldon died intestate, leaving Anne, his wife, and Amphillis, his sister. The sister, upon the common oath, that she believed he died intestate, without wife or children, obtained administration. And in a suit to repeal it as obtained by surprize, it appeared to be the course of the court never to grant it to the next of kin until the wife is cited. The sister moved for a prohibition, and insisted that the ordinary had executed his authority. But the court held, that the ordinary could not be said to have executed his authority, having never had an opportunity to make the election which the statute of the 21 *H. 8. c. 5.* gives him; that it was incident to every court, to rectify mistakes they were led into by the misrepresentation of the parties; that if there were no surprize (of which the court below was judge) there ought to be a prohibition, because, then the administration will have been duly and regularly granted; but here was a plain surprize, and therefore they denied a prohibition. *Str.* 911.

And it is said, that an administration may be repealed without any sentence of revocation to be given in any spiritual court or otherwise; as, by granting a new administration. 1 *And.* 303. *L. of T.* 476.

If an administration is granted, and afterwards a will is produced and proved, the administration shall be revoked. 2 *Roll's Abr.* 907.

Where the administrator, after many goods administered, had his administration revoked, and it was committed to B, who sued the first administrator for goods unduly administered; it was held, that there was no remedy but in chancery. But it is conceived, in such a case as this, the second administrator might maintain an action at law against the first, for money had and received, or trover for any goods remaining in his possession. *Jac. Law Dict.* 10 edit. title administrator.

All acts done by an administrator, as long as his administration continues in force, are good, even though it be afterwards revoked or repealed. But there is a difference taken when an administration is repealed upon a citation or upon an appeal. If it is upon an appeal, which suspends the administration, all acts after such suspension are void: if it is repealed upon a citation, all the acts of the administrator, till the repeal, are good; for by the citation the grant of the administration is not suspended; therefore, if the administration be repealed, all acts done by an administrator, which a rightful administrator might have done, shall be allowed; for in them he acted in the place of a rightful administrator. 6 *Co. Rep.* 18, 19.

CHAP.

CHAP. IX. *Of the Duty of Executors and Administrators in making an Inventory, having the Goods appraised, and of getting in the Effects of the deceased.*

1. AT the time of probate the executor makes oath, that he will make a true and perfect inventory of all the goods and chattels of the deceased. § 20, No. 1582, p. 493, *Pub. Acts.*

And the administrator, at the time of his taking out letters of administration, makes oath, that he will make a true and perfect inventory of all the goods and chattels, rights and credits of the said deceased, and return a just account thereof, when thereunto required. § 21, *Id.*

But the act of 1745 is much more particular, as it requires the executor or administrator to return a full and perfect inventory of all and singular the rights and credits of the said testator or intestate, whether the same be in ready money, judgments, bonds or other specialties, or notes of hand, together with a list or schedule of the books of account of such testator or intestate person, and the number of pages in such books. § 1, No. 748, p. 201, *Pub. Acts.*

And it is said, that if an executor, without making an inventory, shall intermeddle himself with the administration of the goods of the deceased (except in certain cases, as for the expences of the funeral, for insinuation of the testament, for making the inventory, for the necessary preservation of the goods) shall be bound to answer to every one of the creditors his whole debt. *Swin.* 228, 229. *Athon.* 107.

Also it is said, that every legatary may recover his whole legacy at his hands: for in this case, the law presumeth that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same. Whereas, otherwise the executor is presumed not to have any more goods, which were the testator's, than are described in the inventory, the same being lawfully made. *Swin.* 228, 229. *Toth.* 183. *12 Mod.* 346.

And therefore, if any creditor or legatary doth affirm that the testator had any more goods than are comprized in the inventory, he must prove the same; otherwise the judge is to give credit to the inventory, being made in due form of law. *Swin.* 426.

2. Every executor and administrator shall, upon oath, be bound to produce and shew to the appraisers that shall be appointed by the ordinary for that purpose, or any 3 or more of them, all and singular the goods and chattels of the said testator or intestate, as have or shall come into their or either of their hands, possession or knowledge; and within 60 days after his qualification, shall cause to be made a true and just appraisement, upon oath, of all and singular the goods and chattels aforesaid. § 1, No. 748, p. 201, *Pub. Acts.*

Every executor and administrator shall exhibit, or cause to be exhibited, the appraisement, certified under the hands of any 3 or more of the appraisers, into the secretary's office in Charleston, within 90 days after qualification. *Id.*

But

But the place where, and the time when returnable, is altered by the act of 1789; which enacts, *that* when any will shall be proved, or application is made for administration of the estate of any person dying intestate, the court shall direct the executor or administrator to make out an exact inventory of the personal estate of the deceased; and shall appoint 3 or more reputable freeholders, who shall appraise the same upon oath; which appraisement shall be returned to the next court to be held in the county, or to the ordinary of the district, in cases where there are no county courts, within such time as the ordinary shall limit. § 13, No. 1582, p. 492, *Pub. Acts.*

If the goods of a testator or intestate lie in several counties, the court having jurisdiction, shall order appraisement and appoint appraisers in each; which, when made, shall be transmitted by the appraisers to the court where the will was recorded, or administration granted. *Id.*

If the above clause was construed strictly, the ordinaries of the several districts would be ousted of this power: but they do appoint appraisers for the purposes aforesaid, where the goods and effects of a deceased person lie in several districts, and this from the necessity of the case; for, as the law directs the will to be proved in a particular court by § 12, act of 1789, wherever it is proved there must be lodged a power of appointing appraisers, as their return must be made to the same court.

Swinburne says, if the executor enter to the testator's goods, and will make no inventory thereof, then may every legatary recover his whole legacy at his hands; for in this case the law presumeth that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same: whereas, otherwise the executor is presumed not to have any more goods, which were the testator's, than are described in the inventory, the same being lawfully made. *Swin. 228.*

And therefore, if any creditor or legatary affirms that the testator had any more goods than are comprized in the inventory, he must prove the same; otherwise the judge is to give credit to the inventory, being made in due form of law. *Swin. 426.*

In the case of the *Corporation of Clergymen's sons* against *Swainson*, March 5, 1747; where the executors made no inventory, but paid interest for a legacy during their lives, it was decreed by the lord chancellor Hardwicke, that this shall be evidence of assets; and he would not put the plaintiffs to take a strict account of the assets of the testator, as there cannot now be a personal examination of the executors. And he said, nothing is more necessary than to keep executors to deliver inventories. 1 *Vez. 75.*

And in the case of *Orr and Kaines*, March, 1750; where the executor paid several legacies in full, and died, having made no inventory; it was decreed by Sir John Strange, master of the rolls, that his representatives, having assets of the said executor, shall pay the rest. Not exhibiting an inventory (he said,) which every executor ought to do, especially in a deficient estate, is an imputation upon him; and though not conclusive evidence, yet always inclines the court

court to bear harder upon an executor, because he may at any time relieve himself by an inventory, if he finds the estate deficient. He is admitted both at law, on plea of *plene administravit*, and in equity, on account of assets, to shew that the money for which, by solemn inventory on oath, he has charged himself, has, by accident, as perhaps failure of some great merchant, not come to his hands: so that the inventory not being finally binding, is one reason why he ought to exhibit one. Besides, every executor ought, after debts and funeral expences, to see what remains for legatees; and if not enough for all, should make an estimate, and pay all in proportion: Whereas, in the present case, the executor having paid the rest in full, is the strongest evidence against him. The rule is, that whenever an executor pays a legacy, the presumption is, he hath sufficient to pay all legacies; and the court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund: although, if the executor proves insolvent, so that there is no other way, the court will admit a bill by the other legatees, to compel that legatee to refund. But that is not the case here, for the executor appears to have been solvent; and he hath acted so, as that the court will presume him to have received assets sufficient for all the legacies. *2 Vez. 193.*

3. No appraisers that shall be hereafter appointed shall enter upon that office before they shall have taken the following oath, before a justice of the peace, who is hereby empowered to administer the same: "You, A B, C D, E F, &c. do swear, that you will make a just and true appraisement of all and singular the goods and chattels (ready money only excepted,) of G H, deceased, as shall be produced by I K, the executor (or administrator) of the estate of the said G H, deceased; and that you will return the same, certified under your hands, unto the said I K, executor, (or administrator) within the time prescribed by law." § 7, No. 748, p. 202, Pub. Acts.

4. The appraisers shall be allowed 4s. and 8d. each, by the day, whilst employed in appraising any estate, to be paid by the executors or administrators; which expence shall be allowed them in the settlement of their accounts. § 14, No. 1582, p. 492, Pub. Acts.

5. By goods are included all the testator's cattle, as bulls, cows, oxen, sheep, horses, swine, and all poultry, household stuff, money, plate, jewels, corn, hay, wood severed from the ground, and such like moveables. *Law of Test. 379.*

6. Chattels comprehend all goods, moveable and immoveable; except such as are in nature of freehold, or parcel of it. And chattels are either *personal* or *real*: *Personal* are such as belong immediately to the person of a man; and for which, if they be any way injuriously withheld from him, he hath no other remedy but by personal action: *Chattels real* are such as either appertain not immediately to the person, but to some other thing by way of dependency, as a box with charters of land; or such as are issuing out of some immoveable thing, as a lease, or rent for term of years: and chattels real concern the realty, lands and tenements, interest in advowsons, in statutes merchant, and the like. *1 Inst. 118.*

But

But *fishes* in a pond, *conies* in a warren, *deer* in a park, *pigeons* in a dove-house, where the testator had the inheritance, or but for life, in the pond, warren, park and dove-house, are not chattels at all, nor go to the executor, but to the heir with the inheritance: and therefore, they are not to be put in the inventory of the goods and chattels of the party deceased. *Went. 52. Swin. 422.* But if the testator have any tame pigeons, deer, rabbits, pheasants, or partridges, they shall go to the executors; and though they were not tame, yet if they were kept alive in any room, cage, or such like place: so fish in a trunk; also young pigeons, though not tame, being in the dove-house, and not able to fly out. *Law of Test. 379.*

Also, *hounds, greyhounds, spaniels*, and the like, as they may be valuable, and may serve not only for delight, but for profit, shall go to the executors. *Law of Test. 379.*

All slaves must also be put into the inventory, and appraised; as the act of 1740 declares, that they shall be deemed, held, taken, reputed and adjudged in law, to be chattels personal, in the hands of their owners and possessors, and their executors, administrators and assigns, to all intents, constructions and purposes whatsoever. § 1, No. 695, p. 164, *Pub. Acts.*

7. *Debts, which the deceased owed to others*, ought not to be put in the inventory; because they are not the goods of the deceased, but of other persons. *Lind. 176.*

8. *Lindwood* says, that *debts, owing to the deceased*, of which there is not any *writing or obligation*, ought not to be put into the inventory before they be received; because, before that, they are not found to be debts, at least so as they may be handled or taken hold of. But afterwards, when such debts are received, they ought to be put into the inventory, as goods newly accruing. *Lind. 176.*

But unless they be bad debts, it seemeth best to insert them; and even if they be bad debts, or desperate, yet they may be inserted, specifying them as such. And if in the course of administration they shall be recovered, then they shall be accounted for in like manner as the rest of the personalty; and if they cannot be recovered, or so much of them as cannot be recovered, shall not be accounted for as any part of the goods of the deceased.

Our act requires that they shall be returned by administrators, in the inventory. § 1, No. 748, p. 201, *Pub. Acts.*

And every executor or administrator shall be chargeable with so much of the credits of the estate of the deceased as he, after due and proper diligence, shall recover and receive, in like manner as executors and administrators are by the common or statute law of England. § 1, No. 748, p. 201, *Pub. Acts.*

But the oath administered to executors or administrators, with the will annexed, does not require them to make an inventory of the rights and credits of the deceased, but only of the goods and chattels; neither are they, by the oath, obliged to make any return of the inventory or appraisement. § 20 and 21, No. 1582, p. 493, *Pub. Acts.*

9. All *leases* for years the executor shall have; and therefore, leases

ought not to be omitted forth of the inventory. 1 *Roll's Abr.* 915. *Swin.* 421.

If a devise be of land to one and the heirs of his body for 500 years; this is a lease for years, and therefore the executor shall have it: And the reason is, because an estate tail cannot be made of a term. 1 *Roll's Abr.* 915.

Also, all leases for years, though they may be for 1000 years. *Fitzh. Nat. Brev.* 120.

10. Estates *pur auter vie*, that is, estates held by lease, during the life of another person, ought also to be put into the inventory, if not made to him and his heirs.

Also the executor shall have all lands *extended* on any judgment, statute, or recognizance. *Law of Test.* 378.

It is to be observed here, that doubts having arisen, to whom these estates, or the surplus of them, should belong, after payment of the debts of the intestate; the stat. of 14 G. 2. c. 20. makes them distributable as the personal estate of the testator or intestate would have been; but this statute is not of force with us. And neither does our act for the abolishing the rights of primogeniture, and more equitable distribution of intestates' real and personal estates, include this species of property.

11. Also, the executor shall have all arrearages of *rent* due at the death of the testator; and therefore the same shall be put in the inventory. *Law of Test.* 378.

If any person shall rent or hire lands or slaves of a tenant for life, and such tenant for life dies, the person hiring such lands or slaves shall not be dispossessed until the crop of that year is finished; he or she securing the payment of the rent or hire when due. § 23, No. 1582, p. 494, *Pub. Acts.*

12. Corn growing upon the ground, ought to be put into the inventory; seeing it belongeth to the executor: but not the grass or trees so growing; which belong to the heir, and not to the executor. *Swin.* 421.

Also *hops*, though not sown, if planted: and *saffron*, and *hemp*, because sown, shall go to the executors. *Law of Test.* 380.

But Mr. Wentworth thinks, that *roots* in gardens, as carrots, parsnips, turnips, skirrets, and such like, shall not go to the executor, but to the heir; because they cannot be taken without digging and breaking the soil. *Went.* 61, 62.

But lord Coke says, that if the testator shall set roots, his executors shall have that year's crop. 1 *Inst.* 55.

If a man be seised for life, or in fee or tail in his own right, or in the right of his wife, or for years in the right of his wife, and sows the ground with corn, but dies before it is ripe, his executors shall have it, and not the wife or heir: But grass, ready to be cut for hay, apples, pears, and other fruit on the trees, shall not go to the executors. And the reason of the difference is, because the former comes not merely from the soil, without the industry or manurance of man, as the latter doth. *Law of Test.* 379.

Yet, if a lessee at will sows the land with *hay-seed*, and by this increases the grass, and the lessor enters and ejects him, the lessee shall not have it. 1 *Inst.* 56.

But

But for *clover, saintfoin*, and the like, the reason of manurance, labour and cultivation, is the same as for corn; but no case hath occurred wherein these matters have come in question; this kind of husbandry having been in use only of late years.

If the wife had a lease for years, as executrix, and the husband sows the ground with corn, and dies before it is ripe; the corn shall go to his executors, at least so much as is more than the yearly rent of the land. But if the husband and wife were joint-tenants of the land, she shall have the corn, and not his executors. *Law of Test.* 380.

If a parson sows his glebe land, and dies before severance; and after, his successor is admitted, instituted and inducted before the corn is cut, it shall go to the executors or administrators of the deceased, who must pay tithes thereof to the successor. *1 Roll's Abr.* 655.

Emblements are not distrainable for rent arrear by the common law. *2 Black. Com.* 404. But they have been made so by the 11 G. 2. c. 19. which is not of force here. But the following act has vested them in the executors, &c.

If any person shall die after the 1st day of March in any year, the slaves of which he was possessed, whether held for life or absolutely, and who were employed in making a crop, shall be continued on the lands which were in the occupation of the deceased until the crop is finished, and then be delivered to those who have the right to them: and such crop shall be assets in the executors or administrators hands, subject to debts, legacies and distribution; the taxes, overseer's wages, expences of physic, food and cloathing being first paid; and the emblements of the lands which shall be severed before the last day of December following, shall, in like manner, be assets in the hands of the executors or administrators; but all such emblements growing on the lands on that day, or at the time of the testator's or intestate's death, if that happens after the said last day of December, and before the 1st day of March, shall pass with the lands. § 23, No. 1582, p. 424, *Pub. Acts.*

13. Things that are affixed to the tenement, and are made parcel of the freehold, ought not to be put in the inventory; because these belong to the heir, and not to the executor or administrator. *Swin.* 421. *Lovelass*, 31.

And therefore the glass annexed to the windows of the house, because they are parcel of the house, shall descend, as parcel of the inheritance, to the heir; and the executors or administrators shall not have it. And although the lessee himself, at his own cost, do cause the glass to be put into the windows, yet the same being parcel of the house, he cannot take the same away afterwards, without danger of punishment for waste. Neither is there any material difference in law, whether the glass were annexed to the window with nails, or in other manner, either by the lord or by the tenant; for being once affixed to the freehold, the same cannot be removed by the lessee, but shall belong to the heir, and not to the executors or administrators: and therefore the same is not to be put into the inventory, as part or parcel of the goods of the deceased. *Swin.* 421. *Lovelass*, 31.

The

The like may be concluded of *wainscot*; that it ought not to be put into the inventory, as parcel of the goods of the deceased: for being annexed unto the house, either by the lessor or by the lessee, it is parcel of the house. And there is no difference whether it be affixed with great nails or little nails, or by screws, or irons thrust through the posts or walls of the house: for howsoever it be affixed, either in manner aforesaid, or in any other manner, it is parcel of the freehold; and if the executors or administrators shall remove it, they are punishable for the same. *Swin. 421. Lovelass, 32.*

And not only glass and wainscot, but any other such like thing, affixed to the freehold, or to the ground, with mortar and stone, as *tables dormant, leads, mangers*, and such like; for these belong to the heir, and not to the executor or administrator: and therefore they are not to be put in the inventory of the deceased's goods. *Swin. 421. Lovelass, 32.*

So also of *mill-stones, anvils, doors, keys, window-shutters*; none of these be chattels, but parcel of the freehold, or thereto pertaining; and therefore shall not go to the executors or administrators. *Went. 61. Lovelass, 32.*

An executor taking away a *furnace* which was set in the middle of an house, and not fixed to any wall; the heir brought an action of trespass against him: and it was adjudged for the heir, that this should go as part of the freehold and inheritance of the heir. But in the case of *Day and Austin*, Walmsley said, that lord Dyer's opinion was, that where the furnace is not affixed to the wall, the lessee might, within his term, take it away; but not if it was fixed to the wall, for there it would strengthen the house. *Law of Test. 380.*

Pictures and *glasses*, though, generally speaking, are not part of the freehold, yet if put up instead of wainscot, or where otherwise wainscot would have been put, shall go to the heir; for the house ought not to come to the heir maimed or disfigured. *2 Vern. 508. Law of Test. 380, 381.*

But in the case of *Harvey and Harvey*, *M. 14 G. 2.* In trover, by the executor against the heir: it was held by Lee chief justice, that *hangings, tapestry, and iron backs* to chimnies, belonged to the executor; who recovered accordingly against the heir. *Str. 1141.*

And the law seemeth now to be held not so strict as formerly; and if these things can be taken away without prejudice to the fabric of the house, it seemeth that the executor or administrator shall have them; as *tables*, although fastened to the floor; *furnaces*, if not made part of the wall; *grates, iron ovens, jacks, clock-cases*, and such like, although fixed to the freehold by nails or otherwise. *4 Burn. Ec. Law, 244. and Lovelass, 32.*

Dec. 14, 1743; Lawton and Lawton. The question was, whether a *fire-engine*, set up for the benefit of a *colliery*, by a tenant for life, shall be considered as personal estate, and go to his executor; or fixed to the freehold, and go to a remainder man. For the plaintiff (who was a creditor of the tenant for life) evidence was read, to prove that the fire-engine was worth, to be sold, £ 350. and that it is customary to remove them; and that in building of sheds for securing the engine, they

they leave holes for the ends of timber, to make it more commodious for removal, and that they are very capable of being carried from one place to another. And it was urged, that the testator was dead, greatly indebted; and it would be hard, when he has been laying out his creditors' money in erecting this engine, that they should not have the benefit of it, but that the strict rule of law should take place. And it was compared to the case of a cyder-mill, which is let in very deep into the ground, and is certainly fixed to the freehold; and yet lord chief baron Comyns, at the assizes at Worcester, upon an action of trover, brought by the executor against the heir, was of opinion that it was personal estate, and directed the jury to find for the executor. On the other hand, for the defendant, evidence was produced to shew, that the engine cannot be removed without tearing up the soil, and destroying the brick work. By the lord chancellor Hardwicke: This is a demand by a creditor of Mr. Lawton, who set up the fire-engine, to have the fund for payment of debts extended as much as possible. 'Tis true, the court cannot construe the fund for assets further than the law allows; but they will do it to the utmost they can in favour of creditors. This brings on the question of the fire-engine, whether it shall be considered as personal estate, and consequently applied to the increase of assets for payment of debts. Now it appears in evidence, that in its own nature it is a personal moveable chattel, taken either in part or in gross, before it is put up. But then it is insisted, that fixing it in order to make it work, is properly an annexation to the freehold. To be sure, in the old cases, they go a great way upon the annexation to the freehold; and so long ago as Henry the seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time, the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the seventh's time, as removing wainscot fixed only by screws, and marble chimney pieces, is now allowed to be done. Coppers, and all sorts of brewing vessels, cannot possibly be used, without being as much fixed as fire-engines; and in brew-houses especially, pipes must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for the convenience of the trade, landlords will not be allowed to retain them. This being the general rule, consider how the case stands as to the engine which is now in question. It is said, there are two maxims which are strong for the remainder man: First, that you shall not destroy the principal thing, by taking away the accessory to it. And this is very true in general, but doth not hold in the present case; for the walls are not the principal thing, as they are only sheds to prevent any injury that might otherwise happen to it. Secondly, it has been said, that it must be deemed part of the estate, because it cannot subsist without it. Now, collieries formerly might be enjoyed before the invention of engines; and therefore this is only a question of *maius* and *minus*, whether it is more or less convenient for the colliery. There is no doubt but the case would be very clear as between
landlord

landlord and tenant. It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder man. But even in these cases it admits the consideration of public conveniency for determining the question. I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir. One reason that weighs with me is, its being a mixed case between enjoying the profits of the land, and carrying on a species of trade; and considering it in this light, it comes very near the instances in brew-houses of furnaces and coppers. That case also of the cyder-mill, between the executor and the heir, is extremely strong; for though cyder is part of the profits of the real estate, yet it was held by lord chief baron Comyns, a very able common lawyer, that the cyder-mill was personal estate notwithstanding, and that it should go to the executor. It doth not differ in my opinion, whether a shed over such an engine be made of brick or wood; for it is only intended to cover it from the weather and other inconveniencies. This is not the case between an ancestor and an heir, but an intermediate case between a tenant for life and remainder man. The reason of the thing weighs most in favour of the tenant for life; and is like the case of corn growing, which shall go to the executor, and not to the heir or remainder man, it being for the benefit of the kingdom that corn should be sown. It is very well known, that little profit can be made of coal-mines without this engine; and tenants for life would be discouraged in erecting them, if they must go from their representatives to a remote remainder man, when the tenant for life might possibly die the next day after the engine is set up. These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion. Upon the whole, I think this fire-engine ought to be considered as part of the personal estate of Mr. Lawton, and go to the executor for the increase of assets. And decreed accordingly. 3 *Atkyns*, 13.

14. But if a man be seised of a house, and possessed of divers heir-looms, that by custom have gone with the house from heir to heir; it seemeth that these, although no part of the freehold, shall go to the heir, and not to the executor or administrator; and therefore ought not to be put into the inventory. 1 *Inst.* 185. *Lovelass*, 34.

And if a man deviseth these away by his will, this devise is void. *Co. Litt.* 185.

So if an incumbent enter upon a parsonage house, in which are hangings, grates, iron backs to chimnies, and such like, not put there by the last incumbent, but which have gone from successor to successor; the executor of the last incumbent shall not have them, but it seemeth that they shall continue in the nature of heir-looms: but if the last incumbent fixed them there only for his own convenience, it seemeth that they shall be deemed as furniture, or household goods, and shall go to his executor.

Other personal chattels there are, which descend to the heir, in nature of heir-looms, as a monument or tomb-stone in a church, or the coat

coat of armour of his ancestor there hung up, with the pennons and other ensigns of honour, suited to his degree. In this case, although the freehold of the church is in the parson, and these are annexed to the freehold, yet cannot the parson, or any other, take them away, or deface them, without being liable to an action from the heir. Pews in the church are somewhat of the same nature, which may descend, by custom immemorial, from the ancestor to the heir. But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig or disturb it: and if any one, in taking up a dead body, steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral. 2 *Black. Com.* 509.

But the act passed 24th March, 1785, vests the lands, tenements, &c. which they now have, or shall hereafter acquire, in the vestries and church-wardens of St. Philip's and St. Michael's church, and their successors; and so do all the acts of incorporation of the many religious societies in this state. True it is, that most of the clergymen are of the vestry; but they are such not de jure, as being clergymen, as is the case in England, but by election, in the same manner as the rest of the vestry, or perhaps by courtesy: so that they cannot individually bring any action against such person as breaks the soil of the freehold; but the same must be commenced by the vestry and church-wardens of the respective parishes.

15. Writings and evidences which touch the inheritance, shall go to the heir, and not to the executor or administrator. Also charters and deeds, and court rolls, together with the chests. *Went.* 62. 2 *Black. Com.* 509.

And *Swinburne* says, that a box ensealed, or the chest with evidence of the land, though the same be not affixed to the freehold, yet because they contain those things which belong to the heir, they also belong to the heir, and not to the executors: and therefore they are not to be put into the inventory of the deceased's goods. *Swin.* 421.

But as to this, *Roll* makes a distinction, and saith, if the writings which concern the inheritance are in a chest, the executors shall have the chest, and the heir the writings. But if the chest be shut, the heir shall have the chest also; but if it be not shut, the executor shall have the chest. 1 *Roll's Abr.* 915.

But the author of the *Law of Testaments* observeth, that this distinction seemeth not to be well taken; for if it be a box purposed for the keeping of the deeds, the heir ought to have it, whether locked or open: on the other hand, if it be a box designed for other use, as for the keeping linen, it cannot be said to be appurtenant to evidences, although some be in it; for so may other things also: or perhaps it may be a chest or cabinet of great value: surely this shall not go to the heir, when perhaps there is not personal estate sufficient to pay the testator's debts. *Law of Test.* 381.

If a further distinction seemeth necessary, it might be this: that if the executor will not open the box and deliver the writings, the heir, rather than not have the writings, may take the box also; but if the executor will deliver the writings, and retain the box, it doth not seem that one box more than another can be said to be appurtenant to writings, so as to divest the property thereof out of the executor. 4 *Burn. Ec. Law*, 248.

16. But what shall we say to those goods which may seem to belong to the wife rather than to the husband, as her apparel, her bed, her jewels, or ornaments for her person; whether are they to be put into the inventory of the husband's goods, yea or nay? By the civil law, those belonging to the wife, which be called *bona paraphernalia*, are not to be put into the inventory of her husband's goods; neither are they subject unto the payment of the husband's debts: But whether the wife's apparel, with her bed, jewels, and ornaments for her person, be comprehended amongst those goods which the law calleth *bona paraphernalia*, is the matter in question. And it seemeth rather that they are not (saith Swinburne); her convenient apparel, agreeable to her degree, only excepted. Otherwise, whatsoever goods belong to the wife, are presently, by virtue of the marriage, become the husband's; the property thereof being changed and transferred from the wife to the husband. Insomuch that without her husband's licence or consent, she cannot dispose thereof, neither by act in her lifetime, nor at her death by her last will, which she might do if they were *bona paraphernalia*; wherefore, those goods being the husband's and not the wife's, and the property thereof being in him and not in her, it may be concluded, that, in construction of law, those goods above-mentioned, and namely, the wife's jewels, chains and borders, are to be put into the inventory of the deceased husband's goods. *Swin.* 422.

Roll says, the wife, after the death of her husband, shall have convenient apparel for her body, and not the executors of her husband; and of this convenience the court must be the judge. But she shall not have excessive apparel; and if she takes more than is convenient, she shall be taken to be an executor of her own wrong. 1 *Roll's Abr.* 911. *Law of Test.* 383, 384.

And this necessary apparel is protected even against the claim of creditors. 2 *Black. Com.* 435.

And if the husband deliver to his wife a piece of cloth for to make a garment, and dieth; although that this was not made into a garment in the life of the husband, yet the wife shall have this, and not the executor of the husband; inasmuch as it was delivered to her to this intent: but against the debtee of the husband, the wife shall have no more apparel than is convenient. 1 *Roll's Abr.* 911.

But in the case of *Hastings and Douglass*, H. 9 Cha. A chain of diamonds and pearl, worth £370. usually worn by Sir John Davis's wife, who was daughter of the earl of Castlehaven, being by her husband's will devised from her; Berkeley and Jones were of opinion, that she, being the daughter of a nobleman, and permitted to use them frequently, as ornaments of her person, and they being convenient

silent for her degree, she should have them as her paraphernalia; and when there are not debts to be paid (as it doth not appear that there are any in this case,) she shall have them against the executors or administrators of her husband; and the husband cannot dispose of them from his wife by his will; but instantly by his death, the possession of them being in the wife's custody, the property is vested in her, and the husband cannot give them away; for it is not reasonable the husband should leave her naked of those jewels which she usually did wear, and are fit, according to her calling, to wear. But Richardson and Croke were of opinion, that the will was good, and that she may not take them contrary to the devise; but if the husband had not made his will of them, but had left them to the disposition of the law, and the question had been betwixt the executor or administrator and the wife, where there be not any debts or legacies to be paid, or where there be assets to pay all debts and legacies besides those jewels; there, peradventure the law will allow her to take, and to enjoy them as her paraphernalia. *Cro. Car.* 343. *1 Roll's Abr.* 911.

And in the case of *Carey and Appleton*, *M.* 26 C. 2. The husband devised the jewels, which were the paraphernalia of the wife, and died: they were decreed to the wife. *1 Cha. Ca.* 240.

And by Macclesfield lord chancellor: bona paraphernalia are not deviseable by the husband from the wife, any more than heir-looms from the heir; so that the right of the wife to her paraphernalia is to be preferred to that of a legatee. *1 P. Will.* 730.

But it is said, that bona paraphernalia shall not be retained by the wife against debts. And in the case of *Stubbs and Stubbs*, *H.* 31 C. 2. it was held, that where the real estate is chargeable, together with the personal, for the payment of debts, and the personal estate is deficient, the bona paraphernalia shall be liable before the real estate shall come in. *Cha. Ca. Finch.* 415.

But in the case of *Tipping and Tipping*, *M.* 1721. By Macclesfield lord chancellor: bona paraphernalia are liable to debts in favour of creditors only, and not in favour of the heir at law. *1 P. Will.* 730.

And if creditors of the testator, by judgment, take the jewels after his death in execution, when the heir, or executor, or trustees, have other assets sufficient to pay such debts; this is a default in the trustees, for which the widow ought not to suffer as to her bona paraphernalia. *2 P. Will.* 80.

And in *Northey and Northey*, Dec. 6, 1740; lord Hardwicke said, that the late cases have gone so far in the point of paraphernalia, that they have considered a wife in the nature of a creditor, and as having a lien upon real estate. Though the jewels in the present case were worth £ 3000. yet (he said) the value makes no alteration: and that there are several cases where there have been debts standing out against the husband, and yet the wife has been admitted as a creditor to the value of the paraphernalia, even upon trust estates created for payment of debts. *2 Aik.* 78, 79.

And in the case of *Incleidon and Northcote*, March 2, 1746; it was said by lord Hardwicke, that where there is a trust estate, charged with payment of debts, which is sufficient for that purpose, she may

come round upon the trust estate to be reimbursed to the value of her paraphernalia, if the personal has been exhausted by her husband's creditors. And so it hath been determined in several cases. 3 *Atk.* 438.

And in *Snelson and Corbet*, June 16, 1746; where the question was, whether paraphernalia shall be liable to the payment of simple contract creditors and legacies: lord Hardwicke said; at law, where the husband dies indebted, the widow cannot have her paraphernalia; but this court doth not determine so strictly; for if the personal estate hath been exhausted in payment of specialty creditors, she shall stand in their place as to so much upon the real assets of the heir at law; for she has a prior right, and a superior one to legatees, who take only from the bounty of the testator. 3 *Atk.* 369.

Also, if an husband pledges the wife's paraphernalia, and dies, leaving a sufficient estate to redeem the pledge and pay all his debts, she shall be entitled to have it redeemed out of the husband's personal estate.—But the husband may alienate the same in his life-time. 3 *Atk.* 394, 5.

Also, where a daughter's portion was to be paid out of her father's personal estate, the court would not allow the widow to retain her paraphernalia. *Cha. Ca. Finch.* 146.

And where, by marriage articles, it was agreed, that the wife should have no part of the husband's personal estate, but what he should give her by his will, it was declared by the court, that this bars her of her paraphernalia, and from jewels given to her by her husband in his life-time. 2 *Vern.* 83.

17. Goods to which the husband is entitled in right of his wife, and as administrator to her, are not to be put in the inventory after her death; but things which are in action must be put in. *Swin.* 422. *God. O. L.* 153.

In the case of *Sir John St. John, T. 15 Cha.* the lady C was possessed of divers leases, and conveyed them in trust, and afterwards married with AB. The lady received the money upon the leases, and with part of the money bought jewels, and other part of the money she left, and died. AB takes letters of administration of the goods of his wife; and in a suit in the ecclesiastical court, the court would have compelled him to have given an account of the jewels, and for the monies, to have put them into the inventory. But the opinion of the whole court of king's bench was, that he should not put them into the inventory; because the property of the jewels was absolutely in him as husband, and he had them not as administrator: but such things as be in action, and which he shall have as administrator, he shall be accountable for, and they shall be put into the inventory. And for the money received upon trust, it was resolved, that the same was the money of the trustees, and the wife had no remedy for it but in equity; and therefore the husband shall have it as administrator. And in that case it was resolved, that if a woman do convey a lease in trust for her use, and afterwards marrieth, in such case it lieth not in the power of the husband to dispose of it; and if the wife die, the husband shall not have it. *Mar.* 44. *Swin.* a. 423.

18. The

18. The inventory shall be made in the presence of some credible persons, who shall *competently understand the value of the deceased's goods*: for it is not sufficient to make an inventory, unless the goods therein contained be particularly valued and appraised by some honest and skilful persons, to be the just value thereof in their judgments and consciences; that is to say, at such price as the same may be sold for at that time. *Swin. 425, 426.*

But as to the value of the goods upon the appraisement, it is not binding, nor very much regarded at the common law; for if it is too high, it shall not be prejudicial to the executor or administrator; and if it be too low, it shall be no advantage to him: but the very value found by the jury, when it comes in question whether the executor hath fully administered, or hath assets or not, is that which is binding. *Swin. 426. Went. 83, 84.*

Every executor or administrator shall be chargeable with the real value of the goods and chattels in the said inventory contained, in like manner as executors and administrators are by the common or statute law of England. § 1, No. 748, p. 201, *Pub. Acts.*

Every appraisement, made as directed by law, may be given in evidence in any action against such executors or administrators, to prove the value of the estate; but shall not be conclusive, if it shall appear on a trial of the cause, that the estate was really worth, or bona fide sold for more or less than such appraisement. § 13, No. 1582, p. 492, *Pub. Acts.*

19. The inventory shall be delivered to the ordinary within a time to be appointed by his discretion: not arbitrarily, saith Lindwood, but in a reasonable manner, according to the exigency of persons, things and places. *Lindw. 177.*

And as the time for exhibiting such inventory is left to the discretion of the ordinary, so may he remit the making of an inventory for a reasonable cause; or where it may be expedient that the quantity of the goods should not be divulged. *Lindw. 176.*

July 18, 1682; Boon, dying possessed of a large personal estate, made his eldest son executor, and among other bequests, gave his 2d son £2000. to be paid at 3 several payments. The said 2d son took out process against the elder brother, and caused him to be cited before the judge of the prerogative court (where the will was proved) in order to compel him to bring in an inventory. But it appearing to the judge, that the 2 first payments were made, and the 3d offered to be made, he gave sentence, that there was no need of an inventory at the instance of the plaintiff; which was confirmed by the delegates, first upon appeal, and afterwards upon a commission of review. *Raym. 470.*

But by the act of 1745, the executor or administrator is bound to have an appraisement made of the goods within 60 days after qualification: and by the same act, and the one passed in the year 1789, he must make an inventory, and return it to the next ensuing county court, or to the ordinary, within such time as he shall limit or appoint: he is also bound, by oath, to produce the goods to the appraisers, and to make a true and perfect inventory thereof.—It does not appear then, that an inventory can be dispensed with; but it is frequently the practice

tice of the courts of ordinary to extend the time once in every 3 months, upon reasonable cause shewn for such return of the inventory to be made.

20. Every appraisement, made as by law directed, may be given in evidence in any action against such executors or administrators, to prove the value of the estate; but shall not be conclusive, if it shall appear, on a trial of the cause, that the estate was really worth, or bona fide sold for more or less than such appraisement. § 13, No. 1582, p. 492, *Pub. Acts.*

21. By the 4 Ed. 3. c. 7. *Whereas in times past, executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages, in like manner as they whose executors they be should have had if they were in life.* P. 32, *Pub. Acts.*

22. By the 25 Ed. 3. stat. 5. c. 5. *Executors of executors shall have actions of debts, accounts, and of goods carried away of the first testators, and executions of statute merchants and recognizances made in court of record to the first testator, in the same manner as the first testator should have had if he were in life; and the same executors of executors shall answer to other of as much as they have recovered of the goods of the first testators, as the first executors should do if they were in full life.* P. 34, *Pub. Acts.*

23. By the statute of the 31 Ed. 3. stat. 1. c. 11. *In case where a man dieth intestate, the persons deputed by the ordinary to administer his goods, shall have an action to demand and recover as executors, the debts due to the person intestate in the king's court, for to administer and dispend for the soul of the dead; and shall answer also in the king's court, to other to whom the dead person was holden and bound, in the same manner as executors shall answer: and they shall be accountable to the ordinary, as executors be in the case of testament, as well of the time past as of the time to come.* P. 35, *Pub. Acts.*

Before this act, by the common law, administrators had no property in the goods and chattels as executors had; nor could they recover debts as executors could do; but by this statute they are enabled in both those respects: and further, whereas by the common law they were charged by the name of executors, now they shall be charged by the name of administrators. *Gibs. 478.*

For collecting the goods and chattels of the deceased, the executor or administrator has very large powers and interests conferred on him by the law, being the representative of the deceased.

And an executor or administrator may, after the death of the deceased, enter into the house where the deceased lived, and where he died, and where the goods are, and take them away, and justify it; but he must do it within convenient and reasonable time, as within 30 days after his death, or thereabouts, and in a quiet and fair manner, when the door is open. *Shep. Touch. 453.*

An administrator may have an action upon a judgment, statute, recognizance, obligation, or other specialty made to his intestate, or upon any covenant or contract; and he shall have an action of trespass,

or

or trover, for the goods of the intestate taken in his life; and an action for a trespass with cattle in his close. *Com. Dig. Administration.* (B. 13.)

For the most part, the same actions the deceased might have had the administrator shall have also; and in actions arising by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by the executors or administrators; being, indeed, rather actions against the property than the person, in which the executors or administrators have now the same interest that the testator or intestate had before. 3 *Black. Com.* 302.

Where any judgment, after verdict shall be had by, or in the name of any executor or administrator, in such case an administrator of goods not administered may sue forth a writ of scire facias, and take execution upon such judgment. 17 *C. 2. c. 8. P. 79, Pub. Acts.*

An executor or administrator shall regularly charge others for any debt or duty due to the deceased, as the deceased himself might have done. But the executor or administrator shall not charge another, or have any action against him for a personal wrong done to the testator, when the wrong done to his person, or that which is his, is of that nature for which damages only are to be recovered; and therefore an executor or administrator cannot sue another for beating or wounding of the deceased. *Shep. Touch.* 459.

In actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery and slander, the rule is *actio personalis moritur cum persona*, that a personal action dies with the person; and it never shall be revived, either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury. *Loveless*, 22.

24. An executor may sue another in the spiritual court, touching his testator's goods, in this case, viz. if a man devise or bequeath corn growing, or goods, unto one; and a stranger will not suffer the executor to perform the testament: for this legacy, he shall sue the stranger in the spiritual court. *Swin.* 18.

But I apprehend that no legacy can be recovered in the courts of ordinary of the districts in this state, on account of the inefficacy of their power to enforce their decrees: therefore resort must be had to the court of chancery, or the courts of common law: Indeed, there appears to be also another very material defect in the jurisdiction of the court of ordinary, and, without the same is remedied, it might be attended not only with inconvenience, but injury to the citizen: The point I mean is, where a witness to a will refuses to come in and prove it, this court, as at present constituted, has no power to enforce such obedience; and the will can be proved no where else; for all courts of record are the king's courts, and therefore no other court hath authority to fine or imprison. *Finch. L.* 231. So that the very erection of a new jurisdiction, with power of fine or imprisonment, makes it instantly a court of record.

record. *Salk.* 200. *12 Mod.* 388. But the court of ordinary is no court of record in this state.

But if a man take from the executor or administrator the goods of the deceased; for this they must use their action of trespass, and not sue in the spiritual court: for they cannot sue for the goods of the deceased in a court ecclesiastical, but at the common law. *Swin.* 18. *10 Mod.* 21.

Also tenants may be sued at the common law, by executors or administrators, for rent behind, and due to the testator or intestate in his life-time, or at the time of his death; and they may for the same distrain the land charged with the rent. *Swin.* 18.

25. All the executors do represent the person of the testator, and therefore they must all join in suit against others, and in suit by others they must all be made defendants, or at least so many of them as do administer: for though the executors themselves must take notice by the will how many executors there be, and must frame their suit accordingly, creditors and strangers need not take notice of any more than do administer, and execute the office of executor. *Went.* 95.

T. 6 Ja. Smith and Smith. The mother and her son, an infant, were made executors, and administration was granted to her during the minority of her son; she married again, and then her husband, and she, as executrix, brought an action of debt against the defendant, who pleaded in abatement, that the infant was not named; and upon a demurrer to that plea, it was held that the plea was good: but if it had been set forth specially in the declaration, that there was another executor under age, though not joined in the action, it might have been otherwise. *Yelv.* 130. *1 Brownl.* 101.

26. If one executor refuse to undertake the executorship, then is the other executor to be admitted alone, and may execute the will, or commence any suit to be sued alone, as if no other had been named executor. But if he alter his mind, and afterwards become willing, then (his former refusal before the ordinary notwithstanding) he may join with the other executor who proved the will; and if he release any debt due to the testator, the release is as sufficient as if he had never refused. Which is to be understood if he released before judgment; but after judgment, being no party to the suit, he cannot acknowledge satisfaction, because he was not privy to the judgment. *Swin.* 325.

And where there are several executors, and one of them refuseth before the ordinary, and the rest prove the will, he who refused may administer when he will; and therefore they who proved it ought to name him in every action; but if they all refuse, and the ordinary grants administration to another, then it is too late, for in such case they cannot afterwards prove the will. *9 Co.* 38. *Henslow's case.*

27. Co-executors being in law but as one person, therefore the act of one is the act of them all, and the possession of one is accounted the possession of all, and the payment of debts by or to one of them is the payment of or to all of them; and the sale or gift of the testator's goods by one is the sale or gift of all; and likewise a release before judgment of one of them, is a release of all. *Swin.* 328.

But

But it is not so with *administrators*; for they have but one authority given them by the bishop over the goods; which authority being given to many, is to be executed by all of them joined together. *Lord Bacon's Tracts*, 162. 1 *Atk.* 460.

Also one executor shall not be charged with the wrong or devastavit of his companion, and shall be no farther liable than for the assets which came to his hands. And, therefore, where an action was brought against two executors, and the jury found that the two and another were made executors, and that the third wasted the assets to the amount of £ 600. and died, and that only £ 16. came to the hands of the two others; the court held, that they should be chargeable for no more than the £ 16. for that it was the testator's folly to trust such a person, which must not turn to the prejudice of the other executors. 2 *Bac. Abr.* 395.

28. Regularly, one executor cannot sue another of his co-executors, touching any thing relating to his testator's will, or that is within the power, interest, duty, or office of an executor. 2 *Bac. Abr.* 396.

But if the residue of the personal estate, after debts and legacies, be devised to both the executors, one of them may sue the other in the spiritual court for a moiety; for this is in the nature of a gift or legacy to him; and he may bring trespass against the other executor, if he takes it out of his possession; or detain, if he detains it from him. 2 *Bac. Abr.* 396.

Or, in such case, he may have relief in equity.

29. It seemeth to be now settled, that where a man maketh two executors, and deviseth to them the residue of his goods after debts and legacies paid, and one of them dieth, that the survivor shall have the whole. 2 *Lev.* 209. 1 *Vern.* 482.

So where a man devised all the rest and residue of his goods, chattels and personal estate, to two persons, their executors and administrators, and one of them died; on a bill brought by his executor against the surviving devisee, it was held, that the survivor should take the whole to his own use, and should not be a trustee as to the moiety for the representative of him who is dead; and that they were to be considered as joint-tenants where survivorship takes place, as well in cases of chattels as in cases of inheritance. 1 *Abr. Ca. Eq.* 243.

30. The executor of an executor (where there is no joint-executor) is executor to the first testator, and hath right to all the profit, and is liable to all the charge that the first executor had, or was subject unto. But the one testator's goods shall not stand charged for the other testator's debts, but each for his own. *Swin.* 329.

If two be appointed executors, and the one maketh his testament, wherein he nameth his executor, and dieth, his co-executor surviving; in this case, the executor of the executor is not to be joined with the executor surviving, neither in the execution of the will, nor in suits or actions. And if the executor of the executor have any goods or chattels in his hand which did belong to the first testator, the executor of the same testator surviving, may have an action against the executor of the executor for the same: for the power of the executor who died

died first was determined by his death, the other then surviving. *Swin.* 324, 325.

Swinburne says, the executor of an executor cannot sell the land of the first testator. *Swin.* 329.

But in the case of *Rolls and Mason, T. 10 Ja.* Where the devise was, that the executor should sell, it was held, that the executor of the executor might sell, though not in being at the time of the devise. *2 Brownl.* 194.

So in the case of *Garfoot and Garfoot, M. 15 C. 2.* Lands were devised to be sold by the executor. The executor died. The youngest children, for whose benefit the sale was ordered, preferred a bill against the heir. The heir demurs; because it was but an authority in the executor, which is dead with him. But the demurrer was over-ruled. *1 Cha. Ga.* 35.

But the administrator of an executor is not liable: As in the case of *Tucker and Towel, M. 9 G. 2.* There was a libel in the spiritual court for a legacy. The defendant pleaded that it was a legacy given by the will of the testator, whose executor is dead, and he the defendant is administrator of the executor, and therefore is not liable for the legacies. Which plea the spiritual court refused, and therefore he applies for a prohibition.—By lord Hardwicke chief justice: No doubt but the spiritual court hath a general jurisdiction in suits for legacies; but the question is, whether they have in this suit as it is now brought. And I think they have not. For if an executor dies intestate, there is no privity between his administrator and the testator, and in order to continue the privity, there are administrations *de bonis non* granted, which is the constant course. Now here is a suit against the administrator of the executor, who is not administrator *de bonis non* of the first testator: So that there is no privity. But it is said, that here is what amounts to an allegation that this administrator was possessed of the testator's goods, and so may be charged as executor of his own wrong. That doth not appear. But suppose it had been so, that would not be a ground to maintain this suit, but in that case there should be an administrator *de bonis non* set up, and he might then call him to an account in a court of equity; for the ecclesiastical court has only jurisdiction to compel the immediate representative of the testator or intestate to administer, and have power to grant probate, and to commit administration. But when they have done that, they are *functi officio*, and have no further jurisdiction, but to call the executor or administrator to account.—And a prohibition was granted. *Cases in the time of lord Hardwicke, 185.*

31. If administration is granted to two, and one dies, yet the administration doth not cease; for it is not like a letter of attorney to two, where by the death of one the authority ceaseth; but is rather an office; and administrators are enabled to bring actions in their own names; they come in the place of executors, and therefore the office survives. *2 Kern.* 514.

32. When an administrator hath judgment, and dieth, his executors (as such) may not sue execution of the said judgment; for none shall have execution of this judgment but he who shall be subject to the

the payment of the debts of the first intestate. 5 Co. 9. *Brudenel's* case.

33. By the statute of the 17 C. 2. c. 8. *Where any judgment after verdict shall be had, by or in the name of any executor or administrator; in such case, an administrator of goods not administered may sue forth a scire facias, and take execution upon such judgment.* P. 79, Pub. Acts.

34. In all actions brought by executors or administrators, upon contracts, bonds or other things made to the deceased, or for goods taken away in his life, they shall pay no costs by any statute. *Law of Ex.* 462. 2 *Bac. Abr.* 446.

That is to say, costs by the common law are not given in any case: and executors and administrators are not comprized within the several statutes which, in order to prevent vexatious suits, do require other persons to pay costs in like cases; for executors and administrators cannot so well be supposed to intend vexation, seeing that they sue only in the right of another; and have not perhaps so perfect knowledge of the matter as their testator or intestate would have had if he had lived. But as they are not to pay costs, so on the contrary they are not to be allowed costs; because they are supposed to reimburse themselves any charges or expences they may have been at, in the account of the testator's or intestate's estate. 2 *Atk.* 108.

Executors and administrators, when suing in the right of the deceased, shall pay no costs; for the statute of 23 H. 8. c. 15. doth not give costs to defendants, unless where the action supposes the contract to be made with, or the wrong done to the plaintiff himself. 3 *Black. Com.* 400.

So also an executor defendant shall pay costs; and the judgment is, of the goods of the testator, if there are sufficient; if not, of the executor's own goods. Also, when he is defendant, and there is judgment for him, he shall have his costs. 1 *Bac. Abr.* 517. 2 *Bac. Abr.* 446.

H. 12 G. 2: *Marsh and Yellowly*. When an executor must declare as executor, he shall pay no costs; but if the cause of action ariseth in the time of the executor, and is therefore a matter within his knowledge, and for which he may declare in his own right, and need not to declare as executor, he shall be liable to pay costs. *Str.* 682, 1106.

So, where the thing in dispute is matter, not of fact, but of law, and consequently as much within the knowledge of the executor or administrator as of the testator or intestate, it hath been adjudged, that where judgment is given against the executor or administrator upon demurrer, they shall pay costs. As in the case of *Frazer and Moore*, E. 1720. Bill by an administrator: The defendant demurs; and the demurrer is allowed; and the bill is dismissed with costs; and so said to be the constant course in equity, by the whole court of exchequer. *Bunb.* 63.

M. 3 G. *Elwell* against *Quash* and others. There were three executors; one of which gave a warrant of attorney to confess a judgment against himself and his co-executors; pursuant to which a judgment was entered against all the executors of the goods of the testator, for the debt, and against the executor who gave the warrant of

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his own goods for the costs. Upon motion to set this aside, it was held to be ill; for executors may plead different pleas, and that which is most for the testator's advantage shall be received. And the judgment was set aside. *Str.* 20.

E. 1 G. 2. *Crutchfield and Scott.* The question was, whether, in an action by an executor, the defendant should be allowed to bring money into court. And on consideration, it was held he might, and that the effect of it would be, not to make the executor pay, but only lose his subsequent costs. And the same was allowed in the case of *Baker and Turberville*, M. 3 G. *Str.* 796.

T. 7 G. 2. *Caswell and Norman.* An executor brought error of a judgment after a devastavit; and the court held, he ought to pay costs on affirmance. *Str.* 977.

H. 4 G. 3. *Harris and Jones.* On a question, whether an executor should be permitted to *discontinue*, without payment of costs. For the plaintiff executor, it was urged, that an executor should not pay costs in any instance excepting one, namely, where he had brought an action as executor, which he might have brought in his own name: But by the court; the giving an executor leave to *discontinue*, is matter of discretion in the court: and they ought not to give him such leave, in any case where he hath knowingly brought his action wrong, unless he will consent to pay costs. *Bur. Mansf.* 1451.

Also, on a judgment of *non prosequitur*, for the executor's wilful delay, he shall pay costs. *Bur. Mansf.* 1584.

But he shall not pay costs on a non-suit. *Ib.*

CHAP. X. *Of the Payment of Debts by Executors or Administrators.*

1. BY the statute of the 31 Ed. 3. st. 1. c. 11. *The persons deputed by the ordinary to administer the goods of intestates, shall have an action to demand and recover as executors, the debts due to the person intestate, in the king's court, for to administer and dispend for the soul of the dead; and shall answer also in the king's court, to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come.* P. 35, Pub. Acts.

But before this act, action laid by the common law, against the deputies or committees of the ordinary, by the name of executors, but not by the name of administrators until this act. 9 Co. 39.

By the statute of the 30 C. 2. c. 7. *The executors and administrators of any person, who, as executor in his own wrong, or administrator, shall waste or convert any goods, chattels, estate, or assets of any person deceased, to his own use, shall be liable and chargeable in the same manner as their testator or intestate would have been if he had been living.* P. 84, Pub. Acts.

And by the statute of the 4 and 5 W. c. 24. *Forasmuch as it hath been a doubt whether the said statute of the 30 C. 2. did extend to the ex-*
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executors and administrators of any executor, or administrator of right, who, for want of privity in law, were not before answerable, nor could be sued for the debts due from the first testator or intestate, notwithstanding that such executors or administrators had wasted the goods and estate of the first testator or intestate, or converted the same to their own use; it is hereby declared, that all and every the executors or administrators of such executor or administrator of right, who shall waste or convert to their own use, goods, chattels, or estate of their testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate should or might have been. § 12, p. 14, Appendix to Pub. Acts.

Dr. Swinburne says, if a testator, by his testament, doth charge his executor to pay his debts, the creditors, in respect of such charge, may sue for them in the ecclesiastical court. *Swin. 19.*

But this (as it seemeth) must be understood, where there are special words in the will so directing it; as if the testator leave to his creditor such a sum in lieu and satisfaction of his debt, or the like: otherwise the suit must be (as for other debts) in the temporal courts.

In cases where there are two or more executors or administrators to any estate, and any one or more of them hath withdrawn, or shall withdraw or remove out of the state, any creditor, or other person having right cause of action against such estate, may sue out his writ against all the executors or administrators, naming and setting forth therein the executors or administrators, one or more, who is, or are out of the state; and the said writ being executed in the usual form upon those who are within the state, the suit shall be deemed to be good and effectual in law; saving only the judgment, in such cases, shall not extend to work any devastavit upon the persons so absent, to affect them in their private right. *A. A. Dec. 21, 1793.*

2. By the statute of the 3 W. c. 14. *Whereas it is not reasonable or just, that by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts; and nevertheless it hath often so happened, that where several persons having, by bonds or other specialties, bound themselves and their heirs, and have afterwards died, seised in fee-simple of and in manors, messuages, lands, tenements and hereditaments, or had power to dispose of, or charge the same by their wills or testaments, have, (to the defrauding of such their creditors) by their last wills or testaments, devised the same, or disposed thereof in such manner, as such creditors have lost their said debts: for remedy of which, and for the maintenance of just and upright dealing, it is enacted, that all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person, at the time of his decease, shall be seised in fee-simple, in possession, reversion, or remainder, or hath power to dispose of the same by his last will and testament, shall be deemed and taken (only as against such creditors as aforesaid, their heirs, successors, executors, administrators and assigns) to be fraudulent, and clearly, absolutely and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding. § 2, p. 87, Pub. Acts.*

And in the cases before-mentioned, all such creditors may have and maintain

tain actions of debt upon their bonds and specialties, against the heir at law of the obligor and such devisee jointly; and such devisee shall be liable and chargeable for a false plea by him pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended. § 3.

Provided, that where there shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real and just debts, or any portions or sums of money, for any child or children of any person, other than the heir at law, according to any marriage, contract, or agreement in writing, bona fide made before such marriage, the same shall be in full force; and the same manors, messuages, lands, tenements and hereditaments, shall be holden and enjoyed by every such person, his heirs, executors, administrators and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his trustee or trustees, their heirs, executors, administrators and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or portions shall be raised and paid. § 4.

And whereas several persons, being heirs at law, to avoid the payment of such just debts as, in regard of the lands descending to them, they have by law been liable to pay, have sold, aliened, or made over the same, before any process was or could be issued out against them; it is enacted, that in all cases where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands, tenements, or hereditaments, descending to him, and shall sell, aliene, or make over the same, before any action brought or process sued out against him, such heir at law shall be answerable for such debt, in an action of debt, to the value of the said land so by him sold, aliened, or made over; in which case all creditors shall be preferred, as in actions against executors and administrators; and such execution shall be taken out upon any judgment so obtained against such heir, to the value of the said land, as if the same were his own proper debt: saving that the lands, tenements and hereditaments, bona fide aliened before the action brought, shall not be liable to such execution. § 5.

Provided, that where an action of debt upon any specialty is brought against any heir, he may plead riens per descent at the time of the original writ brought, or the bill filed against him; and the plaintiff, in such action, may reply that he had lands, tenements, or hereditaments from his ancestor before the original writ brought, or bill filed; and if upon issue joined thereupon it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given, and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer, or nihil dicit, it shall be for the debt and damages, without any writ to inquire of the lands, tenements, or hereditaments so descended. § 6.

Provided, that every devisee made liable by this act shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements, and hereditaments to him devised shall be aliened before the action brought. § 7.

M. 12 G. Buckley and Nightingale. An heir that hath lands by hereditary descent, shall not be liable for the debt of his ancestor further than to the value of the lands descended: and as soon as he hath paid his ancestor's debts to the value of the land, he shall hold the land discharged; otherwise he might be chargeable ad infinitum. *Str.* 665.

And if an heir is sued upon a bond debt of his ancestor, in which he is bound, and he pays the money; the executor shall reimburse him as far as there are personal assets of the testator's come to his hands, if it is not otherwise ordered by the will. 1 *Cha. Ca.* 74. 2 *P. Will.* 175.

So if a man mortgages land, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage. 2 *Salk.* 449.

Yea, though there be no covenant in the deed for the payment of the mortgage money, yet the personal estate shall be liable in the hands of the executor. 2 *Salk.* 449. 1 *Vern.* 436.

If a man dies indebted by bond, and seised in fee of divers lands, part of which he devises to one, and other part he permits to descend to his heir (not mentioning them in his will;) the lands permitted to descend shall be first applied to pay the bond debts. And the reason is, because the applying the devised lands to pay the bond debts, would disappoint the will; which equity will not permit, if it can be avoided: Whereas it no way disappoints the will to say, that the lands not mentioned should be in the first place liable to pay the debts. But it seems it would be otherwise, if the testator had devised the lands to his heir at law; for though such devise were void (as to the purpose of making the heir take otherwise than by descent,) yet it shews the testator's intent, that the heir should have the land; and therefore it seemeth that the lands devised to one, and the other lands devised to the heir at law, should in such case contribute in proportion to pay the bond debts. Also, for the above-mentioned reason, it seemeth that the lands permitted to descend to the heir at law, and not mentioned in the will, shall be applied to pay the bond debts, before a *specific legacy*; lest otherwise the testator's intention should be disappointed. 3 *P. Will.* 567.

So where lands, upon which there was a mortgage, were devised to one, and other lands descended to the heir at law, it was decreed by the lord chancellor Hardwicke, upon great deliberation, that where the personal estate is insufficient to discharge the incumbrance, the ultimate fund is the land descended to the heir at law: and although the creditor may come upon which fund he pleases, yet if he proceeds against the lands mortgaged, the devisee may have his remedy over against the heir at law; otherwise the mortgage might exhaust the whole lands devised, and there would be no benefit in the will to the devisee. 2 *Atk.* 424—439.

How far a charge upon lands for payment of debts shall enure and be in force against purchasers of those lands from the devisee for a valuable consideration, hath been made a question. As in the case of *Elliot and Merryman*, *E.* 1740. *Thomas Smith* became indebted to several persons by bond, and likewise by simple contract. In three of these bonds, *Goodwin* was bound with him as surety; and afterwards *Goodwin* gave

gave his own bond alone to one of the creditors, to whom *Smith* was bound in a single bond. *Smith* being thus indebted, made his will, and in the beginning of it says, "My will is, that all my debts be paid; and I do charge all my lands with the payment thereof." After which, by another clause in the said will, he gave "all his real and personal estate to *Goodwin*, to hold to him, his heirs, executors, administrators, and assigns, chargeable nevertheless with the payment of all his debts and legacies." Of this will he makes *Goodwin* executor. The testator died in 1724. *Goodwin* proved the will; and in that same year sold a freehold estate of the testator's to *Hunt*; in the year following sold a leasehold of the testator's to *White*; and in 1727, sold another estate of the testator's, consisting of both freehold and leasehold, to *Merryman*. In the several deeds, by which these estates were conveyed from *Goodwin* to the purchasers, the will of *Smith* was recited; and to one of those deeds *Elliot*, a creditor of *Smith*, was a subscribing witness. These lands were sold in the neighbourhood by public auction. At the time of these sales, the creditors all of them either lived in the town where *Goodwin* lived, or within three or four miles of it. During all this time, and till the year 1730, the creditors went on regularly, receiving their interest, which was at £5. per cent. of *Goodwin*. *Goodwin* was a solvent man till 1732; and then he became a bankrupt. In 1734, the creditors of *Smith* brought their bill against the purchasers of these lands, against *Goodwin*, and against the assignees under his commission of bankruptcy, in order to have a satisfaction of their debts out of those lands which were sold by *Goodwin*.—By the master of the rolls: It is almost impossible to make a determination in the present case, but that it must fall out unfortunately on the one party or the other. The dispute arising between creditors on the one side, and purchasers on the other: both these sorts of persons are entitled to the favour of this court; and in the present case, a misfortune must fall upon one of them. On whom it is to fall, is the question. And this is a question, that must so frequently have happened, that it is extraordinary to find no determination directly in point. The case is this: *Smith* being possessed of a real and personal estate, was indebted to several persons by bond; in three of which bonds, *Goodwin* was bound with him as surety; and he had contracted likewise some other debts; and being thus indebted, he makes his will, and charges his real and personal estate with the payment of his debts and legacies, and makes his devisee executor. It is true indeed, the words in the will do not amount to a devise of the lands to be sold for payment of the debts; and they only import a charge upon them for that purpose. However, this is such a devise as is within the meaning of the proviso of the statute of fraudulent devises, and does interrupt the descent to the heir at law.—The testator died in 1724. *Goodwin* paid interest for the debts regularly till 1730. After the testator's death, three sales of this estate were made by *Goodwin*; one, of an estate which was entirely freehold; another, of an estate entirely leasehold; and a third, consisting of freehold and leasehold both. The bill in general is brought by the creditors of *Smith* against the purchasers, in order to have a payment of their debts out of the lands of *Smith*, which were sold to them by *Goodwin*.—With regard

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to the *leasehold* estate, the case is so extremely plain that the sale of that must stand, and that the creditors cannot have satisfaction out of it, that it can admit of no manner of doubt. The executors are the proper persons, that by law have a power to dispose of a testator's personal estate. It is indeed true, that personal estate may be clothed with such a particular trust, that it is possible the court in some cases may require a purchaser of it to see the money rightly applied. But unless there is some such particular trust, or a fraud in the case, it is impossible to say but the sale of the personal estate, when made by an executor, must stand; and that after the sale is made, the creditors cannot break in upon it.—I will now consider the other sales that have been made, and will examine them, first, upon the general rules of the court; and in the next place, upon the particular circumstances which this case is attended with. With regard to the first of these matters, *the general rule is, that if a trust directs that land should be sold for the payment of debts generally, the purchaser is not bound to see that the money be rightly applied. On the other hand, if the trust directs, that lands should be sold for the payment of certain debts, mentioning in particular to whom those debts were owing, the purchaser is bound to see that the money be applied for the payment of those debts.* The present case indeed does not fall within either of these rules; because here lands are not given to be sold for payment of debts, but are only charged with such payment. However, the question is, whether that circumstance makes any difference: and I think it doth not. And if such a distinction were to be made, the consequence would be, that whenever lands are charged with the payment of debts generally, they could never be discharged of that trust without a suit in this court; which would be extremely inconvenient. No instances have been produced to shew, that in any other respect the charging lands with payment of debts differs from the directing them to be sold for such a purpose; and therefore there is no reason that there should be a difference established in this respect. The only objection that seemed to be of weight with regard to this matter is, that where lands are appointed to be sold for the payment of debts generally, the trust may be said to be performed as soon as those lands are sold; but where they are only charged with the payment of debts, it may be said, that the trust is not performed till those debts are discharged. *And so far indeed is true, that where lands are charged with the payment of annuities, those lands will be charged in the hands of the purchaser;* because it was to the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund: But where lands are not burdened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money. And that seems to be the true distinction.—Having thus considered the case under the general rule, I will now consider it under the particular circumstances that attend it. And the particular circumstances are such as are far from strengthening the plaintiffs' case, but rather the contrary. One of those circumstances is, the length of time the plaintiffs have lain by, without at all insisting on any charge upon these estates. *Goodwin* was a solvent man till his bankruptcy in 1732. Here have been three purchases of these estates, made at different times;

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one in 1724, another in 1725, and the third in 1727. The first of them was made by *Hunt*, the second by *White*, and the third by *Merryman*. During all these transactions, the plaintiffs do not mention one word of their charge upon this estate; but, on the contrary, regularly received their interest of *Goodwin*, till the year 1730. 'Tis true, indeed, that there is no express proof that the plaintiffs knew of these purchases, but there is reason to imagine that they did. The purchases were made in the neighbourhood, by public auction. Some of the creditors lived in the same town that *Goodwin* did; and all of them lived within three or four miles of him. And *Elliot*, one of the creditors, was a subscribing witness to one of the purchase deeds. The want of notice too, on the part of the purchasers, is a considerable circumstance in their favour. It is indeed true, that they had notice that there were debts chargeable upon this estate; but it does not appear they knew to whom those debts were owing. Another circumstance is, that *Goodwin* was a co-obligor in three of these bonds, and to another of the obligees he afterwards gave his bond alone, which may well be considered as a satisfaction for that bond. By this it appears, that the creditors greatly relied upon *Goodwin* for their paymaster; and there is not much reason, therefore, that they should now be allowed to resort to the testator's estate. Upon the whole, I am of opinion, that the plaintiffs' bill must be dismissed, and even with costs, as against *White*; there being no manner of pretence for the plaintiffs to come upon that estate, it being all leasehold, and sold to *White* by the executor, who, by law, is the proper person intrusted to dispose of the testator's personal estate. However, with regard to the rest of the defendants, I will only dismiss the bill generally, without costs.—And so it was decreed. *Barnard, Cha. Ca. 78.*

I have given most of the decisions upon this statute of William, although it is not now of force with us; for the parliament of Great-Britain having declared, in the 5 G. 2. c. 7. *that the houses, lands, negroes, and other hereditaments and real estates, situate within any of the plantations belonging to any person indebted, shall be chargeable with all just debts, duties and demands, of what nature or kind soever, owing by any such person, and shall be assets for the satisfaction thereof, in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond or other specialty; and we having uniformly adopted this law, and acquiesced in it under the practice of our courts, (although I have hitherto, in my researches, not been able to find any legislative acknowledgment or acceptance of the said statute of George,) it must be considered as repealing the statute of William: from which it results, that the undue preference given to the heir by law, is now abolished; and the constitution recognizing the justice of this doctrine declares, that the legislature shall pass laws for the abolition of the rights of primogeniture, and for an equitable distribution of the real estate of intestates; which was accordingly done in the year 1791.*

3. By the statute of the 21 H. 8. c. 4. *Whereas divers persons, having other persons seised to their uses of and in lands and other hereditaments, to and for the declaration of their wills, have, by their last wills and testaments, willed and declared such, their lands, tenements, or other hereditaments,*

ments, to be sold by their executors, as well for the payment of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up and advancement of their children to marriage, and also for other charitable deeds to be done by their executors for the health of their souls; and notwithstanding such trust and confidence so by them put in their said executors, it hath often-times been seen, where such last wills and testaments of such lands and other hereditaments have been declared, and in the same, divers executors named and made, that after the decease of such testators, some of the said executors, willing to accomplish the trust and confidence that they were put in by the said testator, have accepted, and taken upon them the charge of the said testament, and have been ready to fulfil and perform all things contained in the same; and the residue of the same executors, uncharitably, contrary to the trust that they were put in, have refused to intermeddle in any wise with the execution of the said will and testament, or with the sale of such lands so willed to be sold by the testator; and forasmuch as a bargain and sale of such lands, tenements, or other hereditaments, so willed by any person to be sold by his executors after his decease, according to the opinion of divers persons; can in no wise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named for the same; by reason whereof, as well the debts of such testators have rested unpaid, to the great danger and peril of the souls of such testators; and to the great hindrance, and many times to the utter undoing of their creditors; as also the legacies and bequests made by the testator to his wife and children, and for other charitable deeds, to be done for the wealth of the soul of the same testator that made the same testament, have been also unperformed, as well to the extreme misery of the wife and children of the said testator; as also to the let of performance of other charitable deeds for the wealth of the soul of the said testator, to the displeasure of Almighty God: for remedy whereof, it is enacted, that where part of the executors named in any such testament of any such person so making or declaring any such will of any lands, tenements, or other hereditaments, to be sold by his executors, after the death of any such testator, do refuse to take upon him or them the administration and charge of the same testament and last will wherein they be so named to be executors; and the residue of the same executors do accept and take upon them the care and charge of the same testament and last will; that then, all bargains and sales of such lands, tenements, or other hereditaments so willed to be sold by the executors of any such testator, by such of the executors as shall accept and take upon him or them such care or charge of administration of the same testament; shall be as good and effectual in the law, as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of such bargain or sale. P. 45, Pub. Acts.

Whereas doubts have arisen respecting the powers of executors to sell and convey the lands of their testator, where the said testator has directed that the same shall be sold; but has not declared by whom the said sale shall be made: Be it enacted, that wherever any person has directed, or shall direct, by his or her last will and testament, duly executed in the presence of 3 or more credible witnesses, that his or her lands shall be sold for the payment of his or her debts, or for the purpose of dis-

tributing the money which may arise from the sale thereof, among his or her legatees; the executors of such person, or the majority of them, who shall qualify on the said will, (if no person is expressly named for that purpose) to sell and convey the said lands agreeable to the intention of the testator. § 1, No. 1470, p. 423, *Pub. Acts.*

But if the executor or executors should die, or renounce, according to law, then the administrator or administratrix, with the will annexed, shall be authorized by this act to sell the real estate of the said deceased, as directed by the will. § 2.

A man devised his lands to be sold after his death, by his executor. One tenders to him a certain sum of money for the lands, but not to the value; and the executor afterwards held the land in his own hand two years, to the intent to sell the same dearer to some other, and took the profits all this while to his own use. Here the executor is to make the sale as soon as he can; and if he do not, the heir of the devisor may enter: for he took the profits here to his own use, not as assets. But if a man devise, that his executor shall sell his land, there he may sell at any time, for that he hath but a bare power and no profit. *Litt.* § 383.

A person, seised in fee, deviseth the land to his executors to pay his debts, and dies: if his executors pay not every debt which the testator owed, upon demand, the heir of the testator may enter for the condition broken; because in law it is a devise upon condition. *Roll's Abr.* 439.

But the chancery may relieve, upon the payment of such debt afterwards.

4. By the statute of 13 *El.* c. 5. For the avoiding of fraudulent deeds, or other conveyances of lands and goods to defraud creditors and others, it is enacted, that every such deed or conveyance shall (as against such creditors) be void and of none effect. P. 67, *Pub. Acts.*

In the case of *Taylor and Jones*, June 13, 1743; a husband who had £1733. stock devised to him after marriage, vests it in trustees, for the benefit of himself for life, of his wife for life, and afterwards for the benefit of his children. By Fortescue master of the rolls: It is a fraudulent settlement as to creditors; but with respect to the wife and children, it is good as against the father, and even against a voluntary conveyance; but is void as to creditors. 2 *Atk.* 600.

5. By the statute of the 43 *El.* c. 8. Forasmuch as it is often put in *in*re, to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying intestate committed unto them, if they require it, will not accept the same, but suffer or procure the administration to be granted to some stranger of mean estate, and not of kin to the intestate; from whom themselves, or others, by their means, do take deeds of gift, and authorities by letters of attorney, whereby they obtain the estate of the intestate into their hands, and yet stand not subject to any debts owing by the intestate; it is enacted, that every person who shall obtain any goods or debts of any person dying intestate, upon any fraud, as is aforesaid, or without such consideration as shall amount to the value of the same goods or debts; or near thereabouts (except it be in satisfaction of some just and principal debt, of the value of the same goods or debts to him owing by the intestate

intestate at the time of his decease,) shall be charged, so far as those goods and debts will satisfy, as executor of his own wrong. P. 72, Pub. Acts.

Whereas it hath frequently happened, that persons who have obtained letters of administration, on suggestion that they have been principal creditors to the intestate; and when they have received sufficient assets of the intestate to satisfy their own debts, have deserted the administration, or have neglected the recovery of the rest of the rights and credits of the intestate, which such administrators ought to have applied towards satisfaction of the rest of the creditors of the intestate: The more effectually to prevent the like for the future, be it enacted, that no letters of administration shall be hereafter granted by the ordinary to any person, as principal creditor to any intestate, but upon special trust and confidence, and for the benefit of all the rest of the creditors. § 8, No. 748, p. 202, Pub. Acts.

6. Assets are *real* or *personal*: where a man has lands in fee-simple, and dies seised thereof, the lands are *assets real*; and where he dies possessed of any personal estate, the goods which come to the executors or administrators are *assets personal*.

Or assets are otherwise of two sorts; the one assets *by descent*, the other assets *in hand*. Assets *by descent* are, where a man is bound in an obligation, and dies seised of lands in fee simple, which descend to his heir, then his land shall be called assets (*assez*,) that is, enough or sufficient to pay the same debt; and by that means the heir shall be charged, as far as the land so to him descended will stretch. *Terms of the Law*.

Assets *in hand* are, where one dies indebted and appoints executors, or dies intestate, and the executor or administrator hath sufficient in goods or chattels, or other profits, to pay the debts, or some part thereof; this shall be said to be assets in his hands, and for so much he shall be charged. *Shep. Touch. 472*.

There is also another division of assets, into *legal* and *equitable* assets: *Legal* assets are such as are liable to debts and legacies by the course of law; *equitable* assets are such as are only liable by the help of a court of equity.

But if a man deviseth land to be sold by one for payment of his debts and legacies, and maketh the same person his *executor*, and dies; the money made by such person upon the sale of the land shall be assets in his hands. 1 *Roll's Abr. 920*.

But otherwise it is, where the land is devised to be sold by the executor and others; for there the money shall not be assets: for they are not trusted with it as executors. 1 *Roll's Abr. 920*. That is, it shall not be assets at law, but it shall be assets in equity. 1 *Abr. Cas. Eq. 141*.

So land *articled* by the testator in his life-time to be sold, is as money. 1 *Salk. 154*.

If there is a *mortgage for years* (though never so many,) this is assets at law; because the whole interest is not gone from the mortgagor, the reversion in fee being left in him: But if it is a *mortgage in fee*, it is only assets in equity; because the legal estate is gone out of the mortgagor. *Plunket and Penson. April 3, 1742. 4 Burn. Ec. Law, 276*.

If there is a mortgage in fee, and two descents cast, and there is more

more due on it than the value of the land, and though the mortgagor says he will not redeem; yet it shall go to the executor, and not to the heir, the equity of redemption not being foreclosed or released. *Tabor and Grover, M. 1699. 2 Vern. 367.*

But if a mortgagee in fee enters for a forfeiture, and after some years enjoyment absolutely sells the land to *J. S.* and his heirs; this estate shall not be looked upon as a mortgage in the hands of *J. S.* but shall go to his heir, and not to his executor. *Cotton and Isles, M. 1684. 1 Vern. 271.*

A man having several mortgages, one in fee, on which he entered for a forfeiture, devised those lands which were mortgaged in fee to his two daughters and their heirs, and the mortgages to them, their executors and administrators. One of the daughters died; her share of the lands which were mortgaged in fee, shall go to her heir, and not to her executors; for it was the testator's intent that those lands should pass as a real estate, though between him and a mortgagor they were but a mortgage. *Noys and Mordaunt, H. 1706. 2 Vern. 581.*

If the heir of the mortgagee forecloses the mortgagor, yet the land shall go to the executor, unless the heir thinks fit to pay him the mortgage money; and then he may have the benefit of the mortgage. *2 Vern. 67.*

If the lands are devised to one for life, remainder to another in fee, and the lands are charged with the payment of a sum of money, either by a former devise, rent, charge, or mortgage, the tenant for life shall contribute and pay a proportionable part of such sum. *Hayes and Hayes, H. 25 C. 2. 1 Cha. Ca. 223.*

And in the case of *Cornish and Mew, H. 27 and 28 C. 2.* it was decreed, that the tenant for life should contribute one third, and he in remainder two thirds to redeem. *1 Cha. Ca. 271.*

The same day, in another cause, where a jointress was of lands mortgaged, it was decreed, that the jointress paying the mortgage, should hold over till she and her executors were repaid with interest. *Bertue and Style. 1 Cha. Ca. 271.*

Also where the mortgagee devised the mortgaged lands to *A* for life, remainder to *B* in fee, and the mortgagor redeemed the land; it was decreed, that *A* should have one third, and *B* two thirds of the mortgage money. *Brent and Best, M. 1682. 1 Vern. 70.*

Lands in mortgage are devised to *A* for life, remainder to *B* in fee. *A* dies; and a bill being brought against his executors, it was held, that though *A* in his life-time might have been compelled to contribute one third towards payment of the mortgage, in respect of his estate for life; yet his executor shall be obliged to contribute only in proportion to the time that *A*, his testator, enjoyed it. *Clyat and Batteson, T. 1686. 1 Vern. 404.*

When, upon a mortgage, money is made payable to the heir or executor; there, before the day, or at the day of payment, the mortgagor hath election to pay it to which he pleases; but after the day of payment is over, and the mortgage forfeited by law, though equity doth give the mortgagor relief, so as upon the payment of the money he shall have his land, yet equity will not revive the election of the mortgagor

gagor to pay it to the heir or executor; but then he shall be forced to pay it to the executor, because it came out of the personal estate of the testator, and thither it shall return. But if in the mortgage neither heir nor executor is mentioned; then, after the death of the mortgagee, the law determines it to be paid to the executor. 2 *Freem.* 20. *Co. Litt.* 208. b. Note 1, 13 edit.

If the grant of the next avoidance be to one, his heirs and assigns; yet it is but a chattel, and shall go to the executors: for where the thing itself is a chattel, the word *heirs* shall not make it an inheritance. *Wats. c.* 10.

In the case of *Oldham and Pickering, M. 8 W.* It was adjudged, that an estate * *pur auter vie*, although it be assets (by the statute of frauds and perjuries) for the payment of debts; yet it is not distributable, nor subject to the payment of legacies. 2 *Salk.* 464. *L. Raym.* 96.

If a man hath a lease for years worth £20. per annum, at the rate of £5. in this case not the whole value of the land, but so much as is above the rent shall be said to be assets in the hands of the executor or administrator. *Shep. Touch.* 474.

As where an executor has a lease for years of land, of the value of £20. a year, rendering rent of £10. a year; it is assets in his hands only for £10. over and above the rent. *Cro. El.* 712.

If one covenant to make a lease for years to the deceased, his executors or administrators, and after his death the lease is made to the executor or administrator accordingly; in this case this lease shall be said to be assets in his hands, and he shall be chargeable for so much to any creditor. *Shep. Touch.* 473.

If an executor renew, he shall account for the new lease as well as the old, for the benefit of the creditors. 2 *Cha. Ca.* 208.

Assets in *Ireland* are assets in *England*; and so, it hath been resolved, that if the executor hath goods of the testator in any part of the world, he shall be charged in respect of them. *Cro. Ja.* 55. 6 *Co.* 46.

So an estate in the *plantations* is testamentary, and assets to pay debts. 2 *Ventr.* 358.

Bonds and *specialties* are no assets, until the money is paid. 1 *Ventr.* 96.

If an executor recovers damages in trespass for goods taken away in the life of the testator; this (when recovered) shall be assets; because he recovers it as executor. 1 *Roll's Abr.* 920.

If an executor recovers (as executor) things in *chancery* by equity; these things so recovered shall be assets. 1 *Roll's Abr.* 920.

Whatsoever the executor or administrator must be forced to sue for, by the name of executor or administrator, being recovered, shall be esteemed assets in his hands. *Shep. Touch.* 473.

A debt due from an executor to a testator, is assets in equity to pay legacies. 3 *Cha. Ca.* 89.

The interest which a master hath in a servant is not assets in the hands of an executor; for a servant whose master is dead, is legally discharged,

* Estates *pur auter vie* are made distributable by the 14 G. 2. c. 20. but it is not of force here.

discharged, and is not servant either to the heir or executor; but meet and honest it is, that one of them continue him in service, till a fit time of providing for him a new master; and fit for him, not to depart suddenly. *Went.* 55.

But the interest which one hath in an apprentice, is a chattel personal, and shall go to the executors. *Law of Test.* 378, 379. *Went.* 55. 2 *Bac. Abr.* 416, 443.

The time of service of any apprentices (indentured to serve their masters, mistresses, their executors or assigns) remaining unexpired at the time of the death of any of the masters or mistresses of such apprentice, and not before assigned, shall, from henceforth, be deemed assets in the hands of the executors or administrators of any such masters or mistresses. § 5, No. 704, p. 176, *Pub. Acts.*

T. 17 C. 2. Walker and Hall. An action was brought against the executor, upon the covenant of the testator to teach an apprentice his trade; and after verdict for the plaintiff, it was moved, in arrest of judgment, that this covenant was personal to the testator, and did not oblige the executors, but only obliged the master, during his life, to teach the apprentice. But by the court: It obliged the executors also, and they ought to see the apprentice taught his trade; and if they be not of the trade, they ought to assign him to another that is of the trade, so that he may be taught according to the covenant. And judgment was given for the plaintiff. 1 *Lev.* 177.

And where a master received with an apprentice £250. and died within 2 years; the apprentice, during that time, having been employed only in inferior affairs; it was decreed, after debts on specialties were paid, that the executors should repay £250. as a debt due on simple contract, deducting, after the rate of £20. a year, for the maintenance of the apprentice during the time he lived with his master. *Soam against Bawden and Eyles.* M. 30 G. 2. *Cha. Ca. Finch.* 396.

The interest in the liberty of a prisoner in execution for debt, is a chattel personal, and shall go to the executors. *Law of Test.* 378. 2 *Bac. Abr.* 416.

If an executor puts in suit a bond of £100. for performance of covenants, and the parties submit to an award, and it is awarded that the obligor shall pay £70. in full satisfaction, and that the executor shall release, which is done accordingly; it is said, that the executor shall be taken to have assets to the value of the whole £100. and though by the award he was compelled to release, it was his own act to submit to the arbitrament. 3 *Leon.* 53.

A reversion expectant upon an estate for life, is assets in the hands of the heir: but the creditor cannot compel the heir to sell it, but must wait till it falls. 1 *Abr. Eq. Cas.* 275. 2 *Wils.* 49.

All those goods and chattels, actions and commodities, which belonged to the deceased, in right of action or possession, as his own, and so continued to the time of his death, and which, after his death, the executor or administrator gets into his hands, as duly appertaining to him in right of his executorship and administration, and all such things as come to the executor or administrator, in lieu, or by reason of that, and nothing else, shall be said to be assets in the hands of the executor

executor or administrator, to make him chargeable to a creditor or legatee. *Shep. Touch.* 472.

Assets in the hands of one of the executors shall be said to be assets in the hands of all the executors; and assets in any part of the world shall be said to be assets in every part of the world: and, therefore, if that point be in issue, and it appear that there are assets in the hands of any one of the executors, or in any county or place whatsoever, the jury must find that there are assets. *Id.*

All goods and chattels, of what nature or kind soever, that are valuable, as oxen, kine, corn, &c. shall be esteemed assets. But such things as are not valuable, as a presentation to a church, and the like, shall not be accounted assets. *Id.*

Goods pledged to the deceased, and not redeemed, or the money wherewith they are redeemed, shall be said to be assets in the hands of the executor or administrator. *Id.*

And all the goods and chattels in action, or possibility, at the time of the death of the deceased, that are afterwards recovered, and of which the executor or administrator hath obtained possession, when they are so recovered, are esteemed assets in his hands. But they are never accounted assets until they are recovered and in possession; therefore, if there be debts owing to the deceased upon statutes or obligations, or otherwise, these are never esteemed assets in the hands of the executor or administrator until they are recovered. So, likewise, though there be debt or damage recovered by a judgment had by the deceased, until execution be made this shall not be esteemed assets in the hands of the executor or administrator. So, if the executor bring an action of trespass against another, *for goods carried away in the life of the testator*, and he have a judgment for damages; in this case, until he hath recovered by execution, it shall not be esteemed assets in his hands. And if the judgment be erroneous, and the execution avoidable; in this case, although it be recovered and gotten in possession, yet it shall not be esteemed assets. And therefore, if one sue another, and recover against him, as administrator of *J. S.* and after a testament made by *J. S.* is produced and proved, and thereby an executor is made; in this case, the money recovered by the administrator shall not be said to be assets in his hands, as to any of the creditors; because the executor may recover it from him, or the debtor will have it again. And if the executor or administrator never recover, or get the thing into his possession, he shall never be charged, especially where he has done his best to get it and cannot. *Lovelass*, 46 and 47.

Although the thing be extinct, and gone as to the executor and administrator himself, yet it may have its being, and be accounted assets as to creditors and legatees. And therefore, if an executor or administrator have a lease for years of land, in the right of the deceased, and afterwards he purchases the fee-simple of the land, (whereby the lease is drowned) yet, in this case, the lease shall continue to be assets as to creditors and legatees. *Shep. Touch.* 473.

And if an executor surrenders a term of years which he had as executor to him in reversion, it is not extinct as to him, but shall still remain

remain assets in the executor to satisfy debts and legacies. 1 *Co. Rep.* 87.

The goods and chattels of other men, in the hands of the executor or administrator, that were in the possession of the deceased, if he had no right to them; or if he had, and they do not belong to the executor, will not make the executor or administrator chargeable; for these shall not be esteemed assets in his hands. And therefore, if the goods of another man be amongst the goods of the deceased, and these come together into the hands of the executor or administrator; these goods, that are the goods of another, shall not be said to be assets in the hands of the executor or administrator. And if the executor receive a rent that belongs to the heir, this rent shall not be said to be assets in his hands. *Lovelass*, 48.

A release of a certain debt due to the testator makes it assets in the executor's hands; because it shall be intended he would not have made the release unless the money had been paid to him. 1 *Nels. Abrid.* 262.

And if an executor puts in suit a bond of £100. for performance of covenants, and the parties submit to an award, and it is awarded that the obligor shall pay £70. in full satisfaction, and that the executor shall release, which is done accordingly; it seems that the executor shall be taken to have assets to the value of the whole £100. for though by the award he was compelled to release, it was his own act to submit to the arbitrament. 3 *Leo.* 53.

If any person shall die after the 1st March in any year, the slaves of which he was possessed, whether held for life or absolutely, and who were employed in making a crop, shall be continued on the lands which were in the occupation of the deceased, until the crop is finished, and then be delivered to those who have the right to them; and such crop shall be assets in the hands of the executors or administrators, subject to debts. *No.* 1582, § 23, *p.* 494, *Pub. Act.*

Emblements on the lands, which shall be severed before the last day of December following, shall, in like manner, be assets in the hands of the executors or administrators; but all such emblements growing on the lands on that day, or at the time of the testator's or intestate's death, if that happens after the said last day of December, and before the 1st day of March, shall pass with the lands. *Id.*

7. If there be a debt due to the king, equity will order it to be paid out of the real estate, that the other creditors may have a satisfaction for their debts out of the personal estate. 1 *Vent.* 455.

A mortgage is a charge upon the personal estate, as well as upon the lands mortgaged; and the personal estate is primarily liable: for a mortgage is a general debt, and the land is only as security. 1 *Atk.* 487.

If one dies indebted by mortgage and simple contract, and one of the simple contract creditors gets judgment of assets when they shall happen, and the executor applieth the assets to pay off the mortgage; the simple contract creditors shall stand in the place of the mortgagee, as to what he hath exhausted out of the personal assets; and this being only by aid of equity, all the simple contract creditors shall come in equally

equally with the creditor that hath judgment. *Wilson and Fielding, M. 1718. 2 Vern. 763.*

So in the case of *Haslewood and Pope, T. 1734*; it was decreed, that if a man deviseth his lands to trustees to pay all his debts, and dies indebted by specialty and simple contract, and the bond creditors recover part of their debts out of the personal estate, and afterwards they apply to be paid the rest of their bond debts out of the real estate devised for that purpose; in this case, as the testator intended all his creditors should be equally paid their debts, the bond creditors shall not come in upon the land, until the simple contract creditors have received so much thereof, as to make them equal, and upon the level with the bond creditors, in respect of what they received out of the personal estate. It was also decreed, that where one gives a specific, or even a pecuniary legacy, and deviseth lands to pay his debts, if a simple contract creditor comes upon the personal estate, and exhausts it so far as to break in upon the specific or pecuniary legacy, these legatees shall stand in the place of the creditors, to receive their satisfaction out of the fund raised by the testator for the payment of their debts: but where a man dies indebted by bond, and leaves a personal estate, and deviseth lands to one in fee, and gives specific legacies, and the creditor, by bond, comes on the personal estate to be paid his bond, the specific legatees shall not stand in the place of the bond creditor, to charge the land devised, because the devisee of the land is as much a specific devisee, as the legatee of a specific legacy. And in this cause, the lord chancellor said, that the personal estate is the natural fund for payment of debts, and which, as against creditors, unless they please, the testator cannot exempt; but against the devisee of his land he may, by appropriating his land as a fund for payment of his debts; but even in that case, according to the general rule, there ought to be express words to exempt the personal estate from the debts, or at least very plainly shewing this to have been the intention of the testator. 3

P. Will. 322.

So, where a man deviseth all his freehold, houses, lands, and hereditaments, to trustees, to hold to them in trust, that the freehold estate should be subject to, and be sold and disposed of by them, for payment of his just debts; and after disposing of some particular legacies, he gave to his nephew the rest and residue of his goods, chattels, debts, rights, credits, and personal estate not before disposed of. Hereupon the question was, whether the personal estate should be first applied to the payment of the debts, notwithstanding the real estate was expressly devised for that purpose. The counsel for the defendants (who were the trustees and residuary legatee) insisted, that the real estate being not only made subject, but directed to be sold for payment of the debts, the personal estate should not be applied for that purpose. But by the whole court of exchequer, here being no negative words to exclude the personal estate from being applied for the payment of debts, that ought first to be applied for the benefit of the heir at law (who was the plaintiff;) and decreed accordingly. *Bunb. 302.*

And by the lord chancellor Hardwicke: in the case of *Walker and Jackson, July 22, 1743*; upon a rehearing at Lincoln's-inn-hall: The

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general rule is, that the personal estate shall be first charged with payment of debts and legacies, and the testator cannot exempt it from being liable to his debts, as against creditors; but as between heir and executor, he may charge them upon any other fund which is not primarily liable, and discharge the personal estate. There are several ways, by any of which a man may give his real estate for payment of his debts; as, first, to trustees; secondly, by way of charge in equity; which the court of chancery will decree to be performed; or, thirdly, he may direct that his real estate may be sold for payment of his debts: but let him do which way he pleases, none of these ways will make the real estate first chargeable, if there be not in the will either express words, or a manifest intent, to discharge the personal estate; but it shall be first liable. *Bunb. 302. 1 Wilson, 24.*

And in the case of *Bridgeman and Dove*, Nov. 27, 1744; by the lord chancellor Hardwicke: I know of no authority where the words, "I make my real estate liable to pay my debts," will exempt the personal estate without any special exemption of personal estate. Nor has the court ever said, that personal estate shall be applied only to pay legacies, and not the debts. Nor will making a particular estate in land liable to pay debts exonerate the personal estate, because it is the natural fund for payment of debts. Suppose a man deviseth a real estate liable to the payment of debts, and, subject to those debts, gives it over to another, or what remains after the payment of debts, which is all one; if there are not express words to exempt the personal estate, it shall be first applied in exoneration of the real estate. *3 Atk. 202.*

8. In an action of debt against two executors, if they plead severally by several attorneys fully administered, and the jury find that the one hath assets, and that the other hath not any assets; the judgment shall be only against him who is found to have assets, and that the other who had not assets shall go quit. *1 Roll's Abr. 929.*

But where two executors join in an acquittance, but one only receives the money, both are chargeable for it as to creditors, who are to have the utmost benefit of the law: but the actual receiver (it is said) is only chargeable as to legatees or persons claiming under distribution; for the substantial part is the actual receiving of the money, and this only is regarded in conscience. By Harcourt lord chancellor. *M. 12 An. Churchill and Hopson. 1 Salk. 318.*

9. Generally, if the debts are in equal degree, the executor may give the preference unto which he will. *10 Mod. 496.*

So that if all the goods are but £20. and debts are due to two by obligation, each of £20. the executor may pay which of them two he will. *Br. Executor. 172.*

But in this case the chancery will sometimes interpose; because this power may be an inlet to fraud. *10 Mod. 496.*

In like manner, the executor may allow unto himself his own debt in prejudice of other debts in equal degree; provided that he hath made an inventory, and provided he be not executor of his own wrong. *Swin. 459. 2 Bat. Abr. 435.* (But an executor of his own wrong shall not in any case be permitted to retain. *3 Blackst. B. 3. c. 2.*)

And this remedy of retainer is by mere act of law, and grounded upon

upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity: but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be put in worse condition than all the rest of the world besides. *For, though a rateable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method,* yet, as every scheme for a proportionable distribution of the assets among all the creditors hath been hitherto found to be impracticable, and productive of more mischiefs than it would remedy, so that the creditor who first commenceth his suit is entitled to a preference in payment; it follows, that as the executor can commence no suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator should prove insolvent, unless he be allowed to retain it. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of an higher nature subsisted. 3 Blackst. B. 3. c. 3.

But if the debt of one creditor be payable at a future day, and of another creditor presently, the executor cannot prefer such future debt, and pay it before the day of payment comes, and leave the other unpaid. But after the day happens, he may prefer either; unless in case of a suit commenced before the day. *Went. 142.*

But amongst executors themselves, or joint-administrators, one executor or administrator may not prefer his own debt before the debt of another executor or administrator, being in equal degree. Thus, in the case of *Chapman and Turner*, in chancery, Feb. 26, 1738. Two bond creditors, *A* and *B*, took joint letters of administration. *A* got into his hands best part of the assets, and retained for his own debt against *B*. On a bill, for an account, the question was, whether *A* by this had got such a legal advantage as to be entitled to keep the assets, and so *B* lose his debt? By the master of the rolls: The rule of this court, in cases of retainer, is, unless the party can shew a legal cause to retain, we never give it him; if he can shew a legal right, we never take it from him. The question then is, whether at law this be a good retainer? At law, no doubt, an executor or administrator hath a right, in case of debts in equal degree, to prefer one to another, and to retain for his own in the first place against any other creditor; and the reason is, because, if a retainer were not allowed, an executor, in case of a deficiency of assets, would have no possible way of obtaining satisfaction for his debt; for at law there is no such thing as splitting of debt, or making a rateable proportion, and therefore he cannot come in upon an average with the rest of the creditors, nor has the advantage of another creditor, who, by bringing his action in due time, may recover his debt, though there be not enough assets at last to answer all demands upon the testator; for he cannot sue himself. So that this privilege of retainer is founded on the policy of the common law, that execu-
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tors may not be deprived of one advantage, without having another in lieu of it, and that they may not be in a worse condition than all mankind besides. But this is not a case between an executor or administrator and a creditor; but between two joint administrators, who are both in the same condition in all respects. No authority hath been cited in this case, to support a retainer by one administrator against the other, nor do I see how there ever could be one; because an administrator can bring no sort of action against his companion, wherein this point might have been settled at law. Neither doth the reason of the law justify such a retainer; for administrators are considered but as one person in law; the possession of the one is the possession of the other; the receipt of one is the receipt of the other; and therefore the retainer of one must be considered as the retainer of the other; and must enure for their mutual benefit in the discharge of the debts of both in proportion. Then the consequence would be very bad, were a retainer allowable in this case; for administrators must fight for the assets, if getting the sole possession would entitle either to a separate right in them. So that, as no legal right of retainer has been shewn, the rule must take place, that he who cannot retain in law cannot in equity. The plaintiff is entitled to an equal distribution of the assets, being an equal creditor, according to conscience and equity; and the defendant must be decreed to account. *Viner, Executors. D. 2.*

Another difference, where debts are in equal degree, is said to be, that regularly that debt shall be paid first for which suit is commenced, and not that for which no suit is commenced; for after a suit begun, the executor (it hath been holden) may not excuse himself by any voluntary payments. *2 Cha. Ca. 201. 2 Vern. 62.*

Yet it is said, that the executor, before notice of such suit, may pay any other creditor in equal degree; and then plead, that he hath fully administered before notice. *Br. Executors. 43. Went. 146.*

And in the case of *Mason and Williams*, it was held by Cowper lord chancellor, that pending a bill in equity against an executor, or after a decree *quod computet*, an executor may pay any other debt of a higher nature, or as high a nature, if there be *legal* assets; but if he hath only *equitable* assets, then the court of chancery will not indemnify him, and suffer him to prejudice and disappoint the first suitor. *2 Salk. 507.*

If there be two creditors in equal degree, and both sue; if the executor doth by covin help the creditor which began his suit last to his judgment or execution first, and there be no assets left to pay the other creditor, he must be satisfied out of the executor's own estate, if this covin be proved against him. But the confession of an action by the executor, where there is a real debt, is no covin: and such recovery by confession is a good plea for the executor against another creditor. *Swin. a. 459.*

In the case of *Joseph and Mott, M. 1697.* A man made his will, and died indebted to several persons by bond, more than his personal estate would pay. A bond creditor brought a bill against the executor, to have a discovery and account of the personal estate, and a satisfaction for his debt. At the hearing, the executor made default; so there was a decree against him for an account and satisfaction out of the assets,

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unless cause shewed: Before the decree was made absolute, another bond creditor of the testator brought an action at law against the executor, upon a bond. He appeared, and because he could not plead this decree at law, suffered judgment to go against him by default. And the account being carried on before the master, it was doubted whether he should allow this judgment on the account. The master of the rolls was of opinion, that the decree must be preferred. And it coming to be reheard before the lord chancellor, he was of the same opinion. *Prec. Cha.* 79.

But in the case of *Darston* and the earl of *Orford*, *H.* 1701. After a bill filed in chancery, against an executor for a discovery of assets, and answer put in, the executor *voluntarily* paid a bond debt without suit. The cause proceeded to a hearing, and an account was decreed. And the question was, whether this voluntary payment, pending a suit here, should be allowed on the account. And the lord keeper Wright thought the payment ought to be allowed; but this being a point of consequence, he ordered precedents to be searched. Afterwards, 3 June, 1702, on precedents produced on both sides, his lordship seemed to be of the same opinion; but said, the case of *Joseph* and *Mott* was a precedent against him, but thought that to be a direct change of the law. The next day (upon consideration of the precedents) his lordship said he was bound up by them, and therefore decreed the payment (being voluntary) to be disallowed; but seemed to disapprove of the case of *Joseph* and *Mott*, where the judgment at law was fairly obtained. Afterwards, 21 Nov. 1702, this decree was reversed in the house of lords, and the payment allowed. *Prec. Cha.* 188. 3 *P. Will.* 401.

So in case of *Waring* and *Danvers*, *M.* 1715. The plaintiff, a simple contract creditor of the testator, brings an action on a special original against the executor, in order to recover his debt. The other simple contract creditors offered the plaintiff to come in for his proportion of his debt with them; but having first filed his original, he insisted on his whole debt, in preference to the rest. Upon which, the executor and the other simple contract creditors entered into articles, agreeing, that first the executor should be paid his debts, and then that all the simple contract creditors should equally share the assets amongst them, exclusive of the plaintiff. And in order to bar the plaintiff at law, the executor gave judgment in the several *quantum meruits* brought by the other simple contract creditors, for the several sums which were laid as damages in the declarations, without ascertaining the damages by writ of inquiry; but those damages were so laid as not to exceed the real debt. Upon this, the plaintiff brought his bill. But the master of the rolls dismissed the bill without costs, it being a hard case; but afterwards, on consideration, he gave costs. And the decree was affirmed by the lord chancellor. The master of the rolls said, if the plaintiff desired it, he would send it to the master, to see whether the judgments confessed to the other creditors be more than their real debts; but the plaintiff not thinking it worth his while, the court decreed as above. 1 *P. Will.* 295.

In the case of *Barker* and *Dumeres*, Jan. 29, 1740. *Robert Dumeres* died

died intestate, and on his death *Edward Dumeres*, who was a relation of his, applied for administration. *Barker*, who was a creditor of Robert by bond, opposed the granting of the administration to Edward, by reason of his insufficiency, and his intention of going over to Jersey. However, administration was granted to him. This administration was in some measure granted to Edward by the leave of this court. Barker had entered a caveat against its being granted to him, though that caveat was afterwards withdrawn. But as there were these objections against him, Barker filed his bill against him the 31st of October last, for the payment of his debt; and prayed that he might give security to abide that determination. His answer came on the 27th of the next month; and an order was made that he should find such security, which he accordingly did. After this *Merry*, who was another bond creditor to the intestate, brought his action at law against Edward, and Edward confessed a judgment to him in Michaelmas term in that same year in £4000. This occasioned Barker's bringing his action at law against Edward, upon the same bond for which the bill was brought here, in order that Edward might not confess judgment to other persons, before he could get judgment against him. As soon as this action was brought, a motion was made on the part of Edward, praying that Barker might make his election which court he would proceed in, whether at law or in equity.—By the lord chancellor Hardwicke: It is very true, that it is the general rule of this court, that a person shall not be allowed to proceed both at law and in equity, for one and the same demand, at one and the same time. But notwithstanding that, it is as certain, that by the ancient course of the court, a person was allowed to bring his action at law against the representative of the deceased, and at the same time to bring his bill here in order to have a discovery of assets; though now it is established, that if the party proceeds in equity against such representative, his bill must be both for a discovery of assets, and a satisfaction for his debt; and he shall not be allowed to proceed both at law and in equity. And where the party has proceeded in both courts, several orders have been, requiring him to make his election. But where the court sees that the representative is confessing judgments, that is a reason (and in my judgment shall always be a reason) that the court will not require the party to make his election. The courts of law distinguish the case of executors, in instances similar to this, from other cases. Therefore, though the constant course of those courts is, on reasonable circumstances, to give a defendant farther time to plead than he is obliged to plead in by the strict rule of the court, yet, when an executor applies for this favour, the time for pleading shall not be enlarged, but by his consenting not to confess judgments in the mean time. 'Tis indeed true, that an executor, in some instances, may honestly confess judgments to other creditors; as where he does it to prevent his being doubly charged, or the like; but when this court sees, that he doth this in order to elude its orders, the court will never permit it. Now, what is the nature of the present case? The original bill was filed the 31st of October last. The answer of Edward came in on the 27th of November following. And in the beginning of Michaelmas term, here is a judgment confessed by

by Edward to Merry, in £ 4000. The administration itself was in some measure granted to Edward by leave of this court. Barker had entered a caveat against its being granted to him, though that caveat was afterwards withdrawn. The proper order for the court to make in this case is, that Barker make a special election, namely, to proceed at law to recover judgment there, and to proceed in this court for a discovery, and an account of assets; but that he shall not be at liberty to take out execution upon the judgment without leave of this court. And it was ordered accordingly. *Barn. Cha. Ca. 277.*

No preference whatever shall be given to creditors in equal degree, where there is a deficiency of assets, except in the cases of judgments, mortgages that shall be recorded from the time of recording, and executions lodged in the sheriff's office, the oldest of which shall be first paid; or in those cases where a creditor may have a lien on any particular part of the estate. § 26, No. 1582, p. 494, *Pub. Acts.*

The debts due by the testator or intestate, shall be paid by executors or administrators, in the order following. § 26, No. 1582, p. 494, *Pub. Acts.*

10. Funeral and other expences of the last sickness. *Id.*

But in *Shell's* case, *T. 5. W.* it is said, that in strictness, no funeral expences are allowed against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees; but not for pall or ornaments. *1 Salk. 196.* [Perhaps the expences of the shroud, and digging the grave, ought also to have been added.]

In general, it is said, that no more than 40s. for funeral expences shall be allowed against creditors. *3 Atk. 249.*

11. Next to these come the charges of the probate of the will, or of the letters of administration. § 26, No. 1582, p. 494, *Pub. Acts.*

12. Next, debts due by the testator to the public are to be discharged. *Id.*

Which must be understood of such debts as are due to the king only by matter of record, and not of sums of money due to the king upon wood-sales, or sales of his minerals, for which no obligation is given; or of amercements in his courts baron or courts of his honours, which be not courts of record; or of fines for copy-hold estates there; or of forfeitures to the crown of debts by contract due to any subject by outlawry or attainder, until office thereupon found. *Swin. a. 455, 456. 2 Bac. Abr. 432.*

13. Next, debts due to private persons upon judgments against the deceased in his life; and after those, debts upon judgments (although by mere confession, and without defence) against the executor or administrator for the debts of the deceased. *Law of Ex. 39. Treatise of Ex. 112. § 26, No. 1582, p. 494, Pub. Acts.*

But it is said, that the executor is not bound to take notice of judgments against the testator in his life, without being made acquainted therewith by the creditors; for the executor is no way privy to his acts. *1 And. 159.*

But in the case of *Littleton and Hibbins, M. 42 El.* it was adjudged, that executors at their peril ought to take notice of debts upon record. *Cro. El. 793.*

In the case of *Paterson and Huddleston*, T. 2 G. 2. An action of debt upon a bond was brought against the defendant as executor. The defendant pleads a recovery against him already had in a plea of debt, and that he had no notice of this bond at that time, and that there was no more in his hands than would satisfy this recovery. Upon this the plaintiff demurs. The court observed, that it did not appear but that this recovery might be in debt upon bond, or other matter of as high nature, and then undoubtedly the plaintiff ought to be barred. But, however, if the recovery was upon a simple contract, they were unanimously of opinion, if the defendant had no notice of the bond, that the recovery would be a good bar. They said, in this consists the difference between duties of a private nature, and duties upon record; for *those*, executors are bound to take notice of at all events, but *these* they need not, where a suit is commenced against them to recover debts of an inferior nature. They said also, that there is no occasion that executors should hold out a suit to the last, before they make such payments; but if an action is taken out against them, it is the same. But if an executor makes a voluntary payment of a debt by simple contract, where there are not assets to satisfy the bond debts, it is otherwise, though he hath no notice: for there are many cases where a man's voluntary act shall prejudice him, where the necessity of law would not. Upon the whole, judgment was given for the defendant. 1 *Barnard*. 186.

If the judgment is satisfied, and is only kept on foot to wrong other creditors; or if there be any defeasance of the judgment yet in force; then the judgment will not avail to keep off other creditors from their debts. *Swin. a. 456. 2 Bac. Abr. 433.*

And of two judgments, he who first sues execution must be preferred; but before, it is at the election of the executor to pay which he will first: only a judgment in a foreign country, as *France*, is to be considered but as a simple contract. *Treat. of Eq. 112. Swin. a. 436.*

But no judgment not docketed and entered in the books of the clerk at the seat of government, shall affect any property, real or personal, as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors, testators, or intestates' estates, except the property, real and personal, within the particular district where such judgment shall be entered up. § 14, No. 1578, p. 489, *Pub. Acts.*

14. In the case of *Harding and Edge*, H. 1682. In the chancery. Upon a special report, the sole question was, how a duty decreed should take place in relation to other debts in point of priority of satisfaction; and ordered, that a decree should precede debts on simple contracts and bonds, and take place next to judgments. 1 *Vern.* 143.

But in the case of *Peploe and Swinburn*, M. 1719. In the exchequer. It was decreed, that creditors by judgment at law, and creditors by decree in equity, shall be paid equally without any preference. *Bumb.* 48.

And it is now become the established doctrine, that a decree of the court of chancery is equal to a judgment in a court of law. So, where an executrix, whose testator was greatly indebted to divers persons,

sons, in debts of different natures, being sued in chancery by some of them, appeared and answered immediately, admitting their demands (some of the plaintiffs being her own daughters); and other of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the court of chancery, being for a just debt, and having a real priority in point of time, not by fiction and relation to the first day of the term, was preferred, in the order of payment, to the judgments, and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings against her at law stayed by injunction. Case of *Morris* against the *Bank of England*. Decreed first at the rolls, by Sir Joseph Jekyll, in August, 1735. Which was affirmed by the lord Talbot, in Nov. 1736. And his lordship's decree affirmed in parliament, in May, 1737. 3 *P. Will.* 402. *Cas. Talb.* 217.

In the case of *Turwin* and *Gibson*, July 31, 1749; where a sum was decreed to the plaintiff, it was ruled by lord Hardwicke, that the solicitor in the cause, for his trouble and money disbursed for his client, had a right to be paid out of the sum decreed; and that in this case the administrator cannot apply the assets in the course of administration. And this, he said, is the constant rule in chancery. 3 *Atk.* 720.

The act of 1784 has given an alternative to the court for enforcing the performance of their decrees: formerly it could be done only by commitment of the person, or sequestration of the party's estate: but the act above alluded to declares, that whereas the present mode of enforcing obedience to decrees in the court of chancery is tedious, and often defective; be it enacted, that in all cases where payment of money is decreed by the said court, it shall be lawful for the party to whom such payment is to be made, to sue forth (at his option) either the usual process for compelling performance of the said decree, or a writ in nature of a *fiery facias*, to make the estate, both real and personal, of the party by whom such money is to be paid, liable to satisfaction thereof, in the same manner as it is on such a writ from the court of common pleas; and that the sheriff of the district in which the estate levied upon lies, shall have the same power and authority to sell and convey the same, as he hath on a *fiery facias* from the court of common pleas. No. 1378, p. 361, *Pub. Acts*.

15. In the case of the earl of *Bristol* and *Hungerford*, M. 1705. It was first decreed at the rolls, that mortgages were to be paid in the first place, and then judgments, and then recognizances: But upon an appeal to the house of lords, it was adjudged, that mortgages are not to be preferred to other real incumbrances; but that mortgages, statutes, and recognizances shall take place according to their priority, and as they stand in order of time. 2 *Vern.* 524.

Where a man mortgages land, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage. 2 *Salk.* 449.

And though there be no covenant in the deed for the payment of the mortgage money, yet the personal estate shall be liable in the hands of the executor. *Id.* 1 *Vern.* 436.

A mortgage is a charge upon the personal estate, as well as upon
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the lands mortgaged, and the personal estate is primarily liable; for a mortgage is a general debt, and the land is only as security. 1 *Atk.* 487.

If an estate is devised in trust for payment of debts, a mortgagee, who lent a further sum upon bond, shall not be allowed to tack it to his mortgage in preference to creditors. 3 *Atk.* 630.

So where a person claims the equity of redemption, as a purchaser for a valuable consideration, without notice of the mortgage, the mortgagee cannot tack his bond to it, and can only have it out of the general assets of the mortgagor. 3 *Atk.* 659.

But if a mortgagor, after making a mortgage, borrows money of a mortgagee upon bond, and the mortgaged premises descend upon an heir at law, or come to a volunteer, the court will not suffer them to redeem the mortgage without paying the bond: and this is to prevent a circuit; because the moment the estate descended, or came to the volunteer, it became assets, and liable to the bond. And the same rule will hold as to a devisee of the mortgaged premises. 3 *Atk.* 630, 659.

16. The next debts that are mentioned by the act of 1789 are executions; and it must be observed, that it prescribes that the oldest of these 3 last species of debt is to be first paid. § 26, No. 1582, p. 494, *Pub. Acts.*

17. Next, rent arrear and unpaid by the testator, shall be paid.

18. Then follow bonds or other obligations. By the English law a bond and obligation were synonymous terms, it being a deed whereby the obligor obliges himself, his heirs, executors and administrators, to pay a certain sum of money to another, at a day appointed; and this must be sealed, which then constituted it a specialty. 2 *Black. Com.* 346, 465.

Debts by simple contract are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise. *Id.* 465.

Administrator—Thomas Townsend, *Ads. Rippon.* January Term, 1795. *Present*—The hon. John Rutledge, chief justice; Ædamus Burke, John F. Grinckie, Thomas Waties, and Elishu H. Bay, associate judges. After hearing the arguments of counsel on both sides, the chief justice delivered the opinion of the court in the words following:—

The question in this case is, whether, on a deficiency of assets, promissory notes given since the executors act of March, 1789, are to be paid in average and proportion with bonds given since that period? And, on mature consideration, we are of opinion, that notes now hold only the same rank which they did before that act was passed.

It has been contended, that the legislature meant to place them on a footing with bonds, and a conversation has been mentioned, which passed between the members of the house of representatives who brought in the bill; but the court can pay no regard to this information; it must not weigh with us in our judicial capacities; the act must be construed by what is to be found in the act itself, and not by

by any thing extraneous. There is nothing in the act which indicates such was the intention of the legislature. If, indeed, at the time of passing the act, nothing but a bond was called an obligation, from the necessity of giving efficacy to the word obligations, which otherwise would be an expression without meaning, we might have been inclined to say that the legislature meant by that word any writing signed by the party acknowledging the debt, although such writing was not sealed. But the word obligation is a technical term, which, in its legal and proper meaning, signifies a contract under seal. Penal bills, a covenant, a charter party, an indenture, are obligations; there is therefore no necessity to construe a note to mean an obligation, in order to make sense of this act. The words "bonds or other obligations," may well be read thus—"bonds or other contracts under seal." If we once admit of suppositions, we may suppose any thing; and one judge may suppose one thing, and another judge another thing. We have no rule to govern us; but, construing the act according to the legal and technical meaning, we stand upon firm ground.

It was some time ago determined by this court, under the county court act, which declares that "notes should constitute specialty," that they were made specialty only for the purpose of bringing an action of debt upon them in the county courts, so that you might join notes, bonds and contracts under seal in one action of debt in the county courts; and I believe no attorney has ever thought of doing so, or of bringing an action of debt on a promissory note in this court.

To shew that the legislature did not mean to make them specialty for the purpose of being paid on a deficiency of assets, in average with bonds, let us refer to the act respecting bills of exchange. That act declares, that in such case, foreign bills, which are protested, shall be on a footing with bonds. Now, if the county court act had made bills and notes specialty, for the purpose of putting them on a footing with bonds, there would have been no occasion for the latter act; and even that act does not, in this respect, affect any but foreign bills; it leaves other bills, as well as promissory notes, on the same footing as they were before.

Let us consider what the law was before the act, with respect to the order and rank of the debts of a deceased person. By the common law, debts ranked in the following order; 1. debts on record—2. debts by specialty—3. debts without. The executors law of 1745 made no alteration in the common law, except that persons who obtained administration as principal creditors, should not prefer one creditor to another in equal degree. Before that act a preference might be given. But with respect to the order of debts, it stood always in this country on the common law, and did not depend on any act of assembly. What has this act of 1789 done? It seems to have been the object of that act to bring and take into one view, all the laws with respect to wills, the duty of executors, and the distribution of assets. Accordingly, it re-enacts the law taken from the statute of frauds, which declares the requisites of a will; it shews the order in which debts are to be paid mostly as they were before the act, and with very little alteration; charges of the last sickness are indeed put on a footing with
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funeral charges; and recapitulates the several kinds of debts. It does not mention the words promissory notes, and from that circumstance it has been argued, that if notes do not come under the word obligations, they are left unprovided for, and therefore are not to be paid at all. But this consequence does not follow; for as they are not excluded by the act, they hold the same right and rank which they did before. It is of great consequence to every free country, that the laws should be fixed and settled; and that when they are so, and generally known and understood, that they should not be changed by implication, or otherwise than by a clear, express and positive declaration of the will of the legislature. It has been the established law of this country, ever since the first settlement of it, that bonds should be paid before notes; and this law is so generally known, that I suppose you would not find one man in an hundred (I speak of men of business) who is ignorant of it. Many good reasons may be given why bonds should have preference of notes. However, as they are proper for the consideration of the legislature, I shall not state them here. If the legislature shall think fit to alter the law, it is to be hoped they will do so clearly and explicitly. In the mean time, it would be wrong for us to give different meanings than the law affixes to a legal technical term, it not being necessary to do so; and this merely from an idea that the legislature meant to do so, which perhaps they did not, though some particular member might have had such an intention. As this is a question of much importance, I have stated thus fully the reasons upon which our opinions are founded.

E. 1715. Parker and Harvey. The grantor's covenant in a marriage-settlement for him and his heirs, that the premises were free from incumbrances, shall come in equally with creditors on bond. *Vin. Executors. Q. a. 39.*

If two men are partners in trade, and one of them gives a bond to leave his wife £1000. and dies; and the other partner administers; if the wife would be paid out of the separate estate of her husband, on there being effects, she shall have a preference before other creditors: But if there is no separate estate, and the wife would have satisfaction out of the partnership effects, then all the partnership debts must be first paid. *3 P. Will. 182.*

Any voluntary bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt: Indeed, if the bond be merely voluntary, a real debt (though by simple contract only) shall have the preference. But if there be no debt at all, then a bond, however voluntary, must be paid by an executor. *3 P. Will. 222: Comyns, 255.*

A man, having a wife who lived separate from him, afterwards married another woman, who knew nothing of the former wife's being alive; but it being discovered to the second wife that the former was alive, the husband (in order to prevail with the second wife to stay with him) some years afterwards gave a bond to a trustee of the second wife, to leave her £1000. at his death, and died, not leaving assets to pay his simple contract debts: if this bond had been given immediately on the discovery, and they had parted thereupon, it had been

been good; but being given in trust for the second wife, after such time as she knew the first was living, and to induce her to continue with the husband, this was worse than a voluntary bond, and decreed to be postponed to all the simple contract debts. But if such bond had been given to the second wife as a recompence for the injury done her, and thereupon she had left the husband, it had been a good bond, and to be paid before any simple contract debts. 3 *P. Will.* 339, 349.

If there be *divers* obligations of the like kind, it seemeth to be in the power of the executor to discharge which obligation, and to gratify which of the creditors he will: which being done, the other creditors are without remedy, if there be no assets; unless the day of payment in the one obligation (as was observed before) be expired, and the day of payment of the other obligation is not yet come; in which case, the former obligation is to be first satisfied; or unless there be suit commenced for some obligation; for then it is not in the power of the executor to discharge another obligation for which no action is brought, in prejudice of the former suit. But an executor may confess judgment on one obligation, and plead that judgment to an action brought on another obligation. And if there be two obligations, and the two several creditors bring several actions against the executor, he that first obtaineth judgment must be first satisfied. *Swin.* 457, 458. 2 *Bac. Abr.* 434, 5.

But no preference whatever shall be given to creditors in equal degree, where there is a deficiency of assets, except in the cases of judgments, mortgages that shall be recorded from the time of recording, and executions lodged in the sheriff's office, the oldest of which shall be first paid; or in those cases where a creditor may have a lien on any particular part of the estate. § 26, No. 1582, p. 494, *Pub. Acts.*

Although the executors are not named in an obligation, yet the law will charge them, for that they represent the estate of the testator. And the law is the same of administrators. But the heir shall not at any time be charged, without express mention of the heir. *Dyer*, 23.

But by the 29 C. 2. c. 3. No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. § 4. P. 82, *Pub. Acts.*

19. Lastly, debts due on open accounts; § 26, No. 1582, p. 494, *Pub. Acts*; which are the only species of simple contracts now known in our law, except those arising by mere oral evidence, which are the most simple of any.

Debts by simple contract are postponed to all others, being debts of an inferior nature; yet an executor (or administrator, *Lovelass*, 57.) is bound, as far as he hath assets, to pay them, as much as any other debt; and therefore a simple contract creditor need not alledge, that the executor had assets to satisfy debts of a superior nature, and his also; but if the truth be, that the executor hath only assets sufficient to satisfy such superior debts, he must plead it. 2 *Bac. Abr.* 434.

But

But albeit the law requires, that debts should be paid according to their superiority, as herein set forth; yet may an executor pay a debt on a simple contract before a specialty, if he hath no notice of such specialty: for otherwise it might be in the power of the obligee to ruin the executor, by keeping his bond in his pocket until the executor shall have paid away all the assets in discharging simple contract debts. 2 *Bac. Abr.* 434, 5.

But of debts upon record, the executor ought to take notice at his peril. 2 *Bac. Abr.* 435.

And in the case of *Greenwood and Brudnish, T. 1720.* A man mortgaged his lands, and gave a bond to perform covenants, and after died intestate. His widow, *without* taking letters of administration, possessed herself of his personal estate, and paid it all away in satisfying debts on simple contract. About seven years after, an old dormant intail was discovered, and the heir intail brought an ejectment, and recovered possession. Whereupon the mortgagee sued the widow upon the bond. She brought a bill for an injunction, having paid away all the testator's assets before any notice of this bond, and therefore alleged that she ought not to be chargeable with a devastavit. The defendant demurred, and the demurrer was clearly allowed, the bill being an attempt to alter the course of law. But if any extraordinary fraud had been charged on the defendant, by which she had been deceived, or induced to pay away the assets, that might have varied the case, *Prec. Cha.* 534.

20. A person indebted by bond and simple contract, deviseth *lands to trustees* to be sold for payment of his debts: It was resolved and declared to be the constant rule, that the creditors should have in proportion, and not the bonds to be first satisfied; for it shall be construed, that (one of them being as much a debt as the other) the testator intended they should all be paid alike; and if the value of the land fall short, they shall be satisfied in proportion: So legatees shall have equal proportion *pro rata*, according to the greatness or smallness of the legacy; for the land is made debtor: But otherwise it is of *judgments*; for these do affect the land by their own strength and nature, and would have had the preference whether such devise had been made or not. 2 *Freem.* 49, 175.

But if a man only charge his lands with the payment of debts, so that the lands descend subject to them, bonds shall be preferred to simple contract debts. 1 *P. Will.* 430.

A man deviseth lands to two persons in trust, to be sold for payment of his debts, and maketh the same persons *executors*. The question was, whether bond debts should have a preference, or all debts be paid *pari passu*? The difference was taken, when the same persons that are trustees to sell the lands are executors likewise, and where not; for in the former case, after the land is sold, it is assets even *at law*; and therefore to decree them to pay otherwise than according to the legal course, would be to decree a devastavit. And in this case it was decreed, that bond debts must be preferred. *Prec. Cha.* 127.

But in the case of *Lewin and Okely, July 26, 1740.* Where there was a devise to trustees for the payment of debts, and the same persons

sons were made executors; it was held by lord Hardwicke, that this shall be equitable, and not legal assets, and all the creditors must be paid *pari passu*. There have been cases (he said) in which it was held, that where trustees are made executors, debts shall be paid in a course of administration; but the modern resolutions have been otherwise. 2 *Atk.* 50.

A lease for years, or a bond or grant of an annuity, taken in a trustee's name, being *personal* assets, shall be applied in a course of administration, and not for the payment of all the debts equally. 2 *Vern.* 764.

If a man, possessed of a term for years, mortgageth it and dies, leaving debts, some by bond and some by simple contract; the equity of redemption is equitable assets, and shall be liable to all the debts equally. 3 *P. Will.* 341.

And the distinction seemeth to be this: Where there are *legal* assets, that is, assets which are liable at law without the help of equity, there the executor may apply them according to the course of law, which allows and requires a preference to be made in certain cases, as hath been mentioned; but where there are only *equitable* assets, that is, assets which are not liable without the help of a court of equity, in such case the court will direct the application thereof according to that course which is most equitable and just, namely, to pay every creditor his share in proportion.

To determine the difference between legal and equitable assets, where land hath been devised for payment of debts, a distinction has been made where the same persons that were trustees to sell the land were executors and where they were not. The generality of the old cases determine, that money arising by sale of land devised to, or subject to the power of executors, to sell for payment of debts and legacies, should be legal assets in their hands, (although they could not be charged with the value of the lands before sale.) Yet some of the old cases, considering the devisee in the double character of trustee and executor, preferred the former, and, consequently, made the assets equitable; and the modern cases incline strongly to this construction: yet it seems, that where an estate descends to the heir, charged with the payment of debts, it will be legal assets. 2 *P. Will.* 416, *Note 2*, 4 *edit.*

So, where the assets are *partly legal* and *partly equitable*; although equity cannot take away the legal preference on legal assets, yet, where one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the court will postpone him till there is an equality, in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets. *Cha. Ca. Talb.* 220. 2 *Vern.* 435.

No letters of administration shall be hereafter granted by the ordinary to any person, as principal creditor to any intestate, but upon special trust and confidence, and for the benefit of all the rest of the creditors; and that all debts of an equal nature shall be discharged by such administrator in average and proportion, as far as the assets of the
intestate

intestate shall extend; and no preference shall be given among the creditors in equal degree. § 8, No. 748, p. 202, *Pub. Acts.*

21. As debts upon judgments, recognizances, mortgages, bonds, and other like specialties, shall carry interest; so also interest hath been allowed upon demands due by *covenant*, although it was objected that they were not liquidated, and only found in damages. *Viner. Interest. C.*

Where a man prays satisfaction for a *simple contract* debt, merely out of *personal* assets, a court of equity will of course direct the debt to be paid with interest, to be computed from one year after the testator's death. *Barnard. 229.*

But where a *real estate* is charged with the payment of debts, as well as the personal; the lord chancellor Hardwicke said he did not know that it was absolutely fixed, that simple contract debts should carry interest from that time; and he believed, if the decrees of the court were looked into, it would be found, that a great many of them are in this form, that the master should take an account of the value of the estate and of the debts, that he should compute interest upon such of the debts as carry interest, without giving any direction, that interest should be computed upon the other debts. *Id.*

Where a man *devises his lands for the payment of his debts*, it is said, that this devise makes the land as a security or mortgage for all the testator's debts, as well those by simple contract as otherwise; and the simple contract debts shall carry interest, as the land, which is the fund, yields annual profits: By lord chancellor Macclesfield, who said that this was the daily practice. 2 *P. Will. 26.*

But where a real estate is *charged* only with the payment of debts, the lord chancellor Hardwicke seemed to think, that this will not make the simple contract debts to carry interest. And he said, that on a general devise of lands for the payment of debts, he should think that simple contract debts ought not to carry interest. *Barnard. 230.*

In the case of *Shirley* and the earl of *Ferrers*, *E. 1779.* Where money was raised by deed upon land, and invested, in the name of a trustee, to pay debts, the residue to the use of the trustee, the simple contract debts were not allowed to bear interest. But if the creditors had filed bills, and obtained separate reports, from that time their debts would have carried interest. *Brown's Cha. Rept. 41.*

The arrears of an *annuity* or rent charge are never decreed to be paid with interest where the sum is uncertain, but only where it is certain and fixed. *Cas. Talb. 2.*

In the case of *Litton* and *Litton*, *T. 1719.* Interest of an annuity was decreed by the lord chancellor from the very day it became due. But Mr. Peere Williams adds a query as to this, and says, it seems the arrears should carry interest only from the first day of payment next after the arrears of the annuity became due; if payable half yearly, then from the next half year day; if quarterly, then from the next quarter day; and so has been the common rule in these cases. 1 *P. Will. 541.*

In the case of *Newton* and *Bennet*, *H. 1784.* Where the defendant, as executor, kept the money of his testator in his hands, without accounting

counting for a long time, and employed it in his trade; and being sued by Newton, a creditor, the question was, whether he shall pay interest. *By the lord chancellor*: there are many sayings in the books to prevent it being laid down as a general rule, that an executor shall pay interest for money used in the course of his trade; but it does not follow, that he may keep the estate of his testator for a long course of time idle, from the persons entitled to it by the will. The doctrine I am desired to lay down is, that an executor may keep his testator's money, and apply it to the uses of his trade, without being liable to interest. It has been argued to this extent, that if the executor is solvent, he shall not pay interest; if he is not, he shall. I cannot see the reason of that case: it is impossible this should have been laid down as the law of the court. I do not say he shall pay interest on the ground of his having called in a debt which bore interest, because an executor has an honest discretion to call in money which he thinks in hazard; but when it is called in, and made profit of in the way of his trade, I think he should be charged with interest; the books say he shall not, because it might be lost; and if it was, he must have answered it. This argument would apply equally to the case where the executor makes actual interest; for the party to whom it is lent may become insolvent.—When the executor did not apply the money to the uses of the will, or bring it hither, I must take it that he kept it for the purpose of making advantage of it in the way of his trade. From 1760. *Bennet*, not a colour of reason for not applying it: he has not shewn any reasonable cause for keeping the money, but has done it merely for the sake of using it in his trade; he therefore must be charged with interest. *Brown's Cha. Rep.* 359.

In the case of *Perkins and Baynton*, E. 1784. Where the defendant had made interest of money, and the question was, whether he should pay interest, and what interest, for a sum of £868. which he had received as administrator to his brother, and kept for five years, and from time to time laid it out in government securities. The lord chancellor ordered, that interest should be paid upon the £868. from 1778, when it came into the defendant's hands, to March, 1783, when it was paid into court; and that such interest should be at the rate of 4 per cent. *Id.* 375.

22. T. 1700. *Staggers and Welby*. At the lord chancellor's house. It was held by Cowper lord chancellor, that if one, by will, subject his lands to the payment of his debts, debts barred by the statute of limitation shall be paid; for they are debts in equity, and the duty remains; the statute hath not extinguished it, though it hath taken away the remedy. 1 *Salk.* 154. 2 *Vern.* 374. and *Trueman v. Fenton*. *Cowper*, 548.

T. 1726. *Blakeway and the earl of Strafford*. In 1707, Sir Henry Johnson was indebted to Blakeway in £343. In 1714, he received £50. in part. In 1719, Sir Henry died, having made his will, and devised his lands to his executors, in trust to pay his debts. The executors renouncing, the earl of Strafford administered, with the will annexed. Blakeway brought his bill to be paid out of the assets. The earl of Strafford pleaded the statute of limitations; and that neither he

nor (as he believed) Sir Henry, made any promise to pay the debt, within six years before the bill brought. Lord chancellor: I would be cautious of giving any relief against an act of parliament; but it is plain the debt is not extinguished by the statute of limitations, since the statute must be pleaded, which the defendant is not bound to do; and if he afterwards will acknowledge the debt, it takes it out of the statute: and his lordship over-ruled the plea. Upon appeal brought in the house of lords, this decree was reversed, and the plea ordered to stand for an answer. *2 P. Will. 373.*

But if the debtor, by his will, directs, that *all his debts* shall be paid, or makes any provision for the payment of his debts in general; this will revive it, and bring it out of the statute, and make his executors liable. *Prec. Cha. 385.*

So, if the debtor, upon application for that particular debt, acknowledges and promises payment (for a bare acknowledgment is not sufficient;) this will bring it out of the statute: for the acknowledgment and promise is a new evidence of the debt. *Id.*

But in the case of *Norton and Freeker, H. 1737.* It was said by the lord chancellor *Hardwicke*, that an executor is not compellable, either in law or equity, to take advantage of the statute of limitations, against a demand otherwise well founded. *1 Atk. 526.*

23. Where a testator is much indebted, and the executor is desirous to be rid of the assets; the executor's safest way is, to file a bill in chancery against the creditors, to the end they may, if they will, contest each other's debts, and dispute who ought to be preferred in payment. *2 Vern. 37.*

24. In debt against an executor, if the defendant plead fully administered, if any assets be found in his hands, although there be not to the value of the debt; yet the plaintiff shall have judgment for his whole debt of the goods of the testator. *1 Roll's Abr. 929.*

But if it be found, that he had nothing in his hands, the judgment shall be, that the plaintiff shall take nothing by the writ, and shall not have judgment of the debt; for he hath waved this advantage by taking of the issue, and judgment is to be given upon the verdict. *1 Roll's Abr. 929.*

Plene administravit is a good plea in covenant against executors, where breach is for non-payment of rent incurred in their own time; for the plaintiff can only have judgment *de bonis testatoris*. *1 Wils. 4.*

The method of paying debts, with legal assets, in such manner as the law requires, is as follows. If one that hath a debt due to him from the deceased, upon a simple contract, or the like, sue the executor or administrator for it, and there be debts due to others upon bonds and specialties unsatisfied; in this case the executor or administrator may not pay this debt, nor may he suffer the plaintiff to recover in the action; for if he doth, and he hath not assets besides to satisfy the debts due upon bonds and specialties, he must satisfy so much out of his own estate as he hath so paid, or suffered to be recovered from him; for, in the case of an action brought, he is to plead, and to set forth these debts upon specialties, and to say that he hath no more than what is sufficient to satisfy them; and thereby he shall bar the plaintiff in his action:

action. In like manner it is, if one that hath a debt due to him from the deceased, upon an obligation, sue the executor or administrator thereupon, and there be debts due to others upon judgments, statutes, or recognizances, and the executor or administrator suffer the plaintiff to recover the debt due upon the obligation, for want of pleading the judgments, &c. in this case he must pay so much out of his own estate, towards the satisfaction of the said debts due upon judgments, &c. as he hath paid of the debt due upon the obligation. But here it must be observed, that no judgment or statute that is discharged, or is left and suffered to lie, by agreement, to bar others of their debt, shall be any bar to others that sue for their due debts upon obligations, &c. and therefore, if any executor or administrator shall plead such judgments, &c. in bar of any other debt sued for by any other creditor, the creditor may, by special pleading, set forth this matter of covin, and avoid the plea and bar of the executor or administrator. *Shep. Touch. 457.*

Whereas divers suits and actions against executors and administrators, have heretofore been sued in this court, to the end that the lands, tenements, and other real estate of their testators and intestates, might be made liable to the payment of the several demands of the plaintiffs in such actions; and whereas the defendants have commonly pleaded that they had fully administered all and singular the personal assets which came to their hands to be administered, and, without any proof of the fact, the plaintiffs have admitted such pleas to be true; and by the plaintiff's replying, that his testator or intestate died seised of lands subject to the payment of debts, and the defendant demurring to that plea, judgment has usually and of course been awarded to the plaintiff in the action. But inasmuch as the admission of such pleas, without some proof of the facts pleaded, may eventually be injurious to those persons who, by devise, descent, or otherwise, are interested in the lands of the original debtor, and by fraud or collusion, real assets may be subjected and made liable to the payment of debts before the personal assets are exhausted and fully administered: for prevention whereof, *it is hereby ordered*, that no plea of plene administravit shall, for the future, be admitted in any such action or suit against executors or administrators; but the defendant pleading such plea shall be, and he is hereby obliged to file with the same, in the clerk's office, a full and particular account of his administration upon oath; that it may appear to the court that the personal assets of the testator or intestate are really and in truth fully administered; and then, if the plaintiff shall think proper to admit the truth of such plea, he shall be at liberty to proceed in the said action to judgment in the ordinary course, and not otherwise: and if any defendant, who shall plead as aforesaid, shall refuse or neglect to support his said plea, by rendering an account of his administration, on oath, in the manner herein before directed, the plaintiff shall be at liberty to take issue upon such plea, and bring the merits thereof to trial. *22d rule of the court of common pleas of South-Carolina.*

25. If an executor plead *ne unque executor*, and is found executor, the

the judgment shall be general, to recover the debt for his false plea.
1 Roll's Abr. 930.

In an action of debt against an executor, who pleadeth that he is not executor, nor ever administered as executor, and this is found against him, the judgment shall be of the goods of the testator, if there are any such: if not, of his own goods; as well for the debt, as for the damages and costs. *1 Roll's Abr. 930. 1 Atk. 293.*

26. An executor shall not be forced to pay legacies, until the legatees shall give bond to refund in proportion, or in the whole, for the satisfaction of debts, if any shall appear unsatisfied. *Cha. Ca. Finch. 136. Viner. Devise. Q. d. 7.*

For debts are to be paid before legacies: and if the spiritual court will compel an executor to pay a legacy before he pay the testator's debts; a prohibition will lie. *Law of Ex. 182.*

So if a man bind himself in an obligation to perform a certain thing, and deviseth divers legacies, and dieth, leaving only sufficient to satisfy the obligation, if this shall come to be forfeited; yet this obligation shall not be any bar of the legacies, because it is uncertain whether the obligation will ever come to be forfeited: but the executor shall make a conditional delivery of the legacy, to wit, that if the obligation shall be recovered against him, the legatee shall re-deliver the legacy. *1 Roll's Abr. 928.*

Though bona paraphernalia are liable to husbands' debts, yet they are preferable to legacies; and in marshalling assets, such priority is always allowed. *2 Vez. 7. Note.*

CHAP. XI. *Of the Payment of Legacies.*

THE word legacy, in its ordinary signification, is applied to money; but it may signify a devise of land, and land may pass thereby. *Doug. 39.*

A specific legacy (strictly speaking) is said, by lord Hardwicke, to be a bequest of a particular chattel, specifically described, and distinguished from all other things of the same kind; or, in other words, an individual legacy. Money, therefore, if sufficiently distinguished, may be the subject of a specific bequest, as money in a certain chest. So of stock. So a bequest of part of a specific chattel may be equally a specific legacy. On the other hand, a mere bequest of quantity, whether of money or any chattel, is a general legacy; and the purpose to which a general legacy is to be applied, will not alter its nature. *1 P. Will. 540. Note 1. 4 edit.*

1. Persons denying the Trinity, or asserting that there are more gods than one, or denying the christian religion to be true, or the holy scriptures to be of divine authority, shall, for the second offence, be incapable of any legacy. *No. 202, p. 4, Pub. Acts.*

2. A legacy is extinct, by taking a bond for it. *Yelv. 39.*

When the statute of limitation was pleaded in bar to a legacy demanded, due twenty years before, it was held by the lord chancellor, that a legacy

legacy is not barred by the statute, nor ever had been so held. 2 *Freem.* 22.

The father by his will gave to his daughter £1000. to be first paid after his debts, besides a share out of the dividend of his estate. Afterwards, on her marriage, an *agreement* was made, for what she should have out of her father's estate, and that it should be only £1100. and that was to be in full of what was intended her thereout. It was decreed by the master of the rolls, and confirmed by the lord chancellor, that this was an ademption of the legacy, and that the £1100. was to be in full of what the daughter was to have out of the said estate. *Hale and Aston.* 21 C. 2. 2 *Cha. Ca.* 35.

A man, by his will, gave his four daughters £600. apiece, and afterwards married his eldest daughter to the plaintiff, and gave her £700. portion. After that, he makes a codicil, and gives £100. apiece to his unmarried daughters, and thereby *ratifies and confirms his will*; and dies. The plaintiff preferred his bill for the legacy of £600. given to his wife by the said will. It was held by the master of the rolls, that the portion given by the testator in his life-time should be intended in satisfaction of the legacy. And it was agreed to be the constant rule, that where a legacy is given to a child, who afterwards, upon marriage or otherwise, receives the like or a greater sum, it shall be intended in satisfaction of the legacy, unless the testator declares his intention to be otherwise. And it was said, the words of *ratifying and confirming* do not alter the case, though they amount to a new publication; being only words of form, and declare nothing of the testator's intent in this matter. 2 *Freem.* 224. *Irod and Hurst.* M. 1698.

A legacy given out of a term for years, if the term determines, the legacy is extinct. *Cha. Ca. Finch.* 464.

A legacy of a lease of tithes is extinguished by a renewal of the lease; but a republication of the will after the renewal restores the legacy. 2 *Vezey*, 418.

The principal of a bond for £35,000. was decreed to be a specific legacy (notwithstanding the sum was named) and to be adeemed *pro tanto*, or wholly, by the testator having received part of it in his life-time, as a dividend under the bankruptcy of the obligor. 2 *Bro. Cha. Rep.* 108. where are many learned observations of lord Thurlow's on the distinction between specific and general legacies.

A legacy was devised out of debts due in several counties, and they were all called in before the testator's death; yet the legacy remained good. And a difference was taken between a pecuniary and a specific legacy; for in the first case the legacy will remain, though the debt upon which it is charged be paid in: but the specific legacy may be lost by being altered. So where the legacy was greater than the debt out of which it was directed to be paid did amount unto; yet such sum being expressly devised, and there being assets, it was decreed to be paid. *Cha. Ca. Finch.* 152. *Raym.* 335.

T. 1728. *Ford and Fleming.* One by will devised thus: I give to my grand-daughter, Mary Ford, (the plaintiff) the sum of £40. being part of a debt due and owing to me for rent from G. M. she allowing what charges shall be expended in getting the same: also, I give unto my

my two grand-sons, the rest and residue of what is owing to me from the said G. M. which is about £ 40. more, to be equally divided between them, they allowing charges as aforesaid. Afterwards, the testator received the whole debt owing for rent from G. M. For the plaintiff it was insisted, that there was a difference between a specific and a pecuniary legacy; that though the disposing of a specific might be an ademption of it, yet this being a pecuniary legacy, the paying the money to the testator would be a loss of it. On the other side, it was insisted, that there is a difference between a voluntary and a compulsory payment; that though the first was no ademption, yet the second was, and that the testator compelled G. M. to pay in the money. But the lord chancellor was of opinion, that there was no foundation for the difference taken in the books between a voluntary and compulsory payment; for the latter might be, with an intent to secure the legacy at all events; and decreed to the plaintiff the £ 40. legacy.

1 *Abr. Cas. Eq.* 302.

So in the case of *Ashton and Ashton*, M. 1735. Where the testator deviseth a debt, and afterwards receives it, or otherwise calls it in: in neither of these cases is this an ademption of the legacy; seeing this might be done from an apprehension of such debt being in danger, and with a design to secure it; and being personal estate, and not diminished by remaining in the testator's coffer instead of the hands of the debtor, it may well pass by the will. 3 *P. Will.* 386.

M. 1736. *Partridge and Partridge*. The testator devised to the legatee £ 1000. capital South-sea stock. At the time of making his will he had £ 1800. of such stock; and after, by sale, reduced it to £ 200. which he after increased to £ 1600. and died. Between the making his will and his death, the act took place, which changed three fourths of the capital South-sea stock into annuities. This legacy is not taken away or impaired, by the sale, or by the act of parliament. *Cas. Talb.* 226.

3. Personal estate vests, immediately on the death of the testator, in the executor, and cannot be taken without his consent. *Black. Com.* 2 *Vez.* 512.

For, if I have a general legacy of £ 100. or a specific one, of a piece of plate, or horse, I cannot, in either case, take it without the consent of the executor. *Co. Litt.* 111.

If bank stock be given by will, it does not vest immediately in the legatee, but in the executor or administrator in trust for him. *Doug.* 507.

The legatary or devisee may not, of his own head, take the goods or chattels devised to him, out of the possession of the executor; because the law gives him a remedy for the same, and because the law doth not appoint that the legacies shall be paid until the debts of the testator be first satisfied. *Swin.* 19. 2 *Bac. Abr.* 435.

For if the executor do detain the legacy, or do slack the performance of the testator's will, the legatary must sue the executor in the ecclesiastical court, for the same legacy so detained or not satisfied. *Swin.* 18.

For where a devise is made of goods, if the executor will not deliver them to the devisee, he hath no remedy by the common law. *Terms of the L.* Devise.

For

For an action on the case lieth not against an executor for a legacy, unless he promise to pay it upon good consideration; for legacies are only to be recovered in the spiritual court, or in the courts of equity. 1 *Sid.* 46. *Vin. Actions.* O. c. 7.

If an executor promises to pay a legacy in consideration of assets, assumpsit will lie on such promise. *Cowper. Atkins and Ux. v. Hill,* 284. *Hawkes and Ux. v. Saunders,* 289.

On a personal demand against an executor, there can be no judgment *de bonis testatoris.* *Cowper,* 289.

But if assets be proved, or admitted, and an assent of the executor to the legacy, judgment may be given *de bonis propriis*, because, having assets is a sufficient consideration. *Id.* 293.

And in case of suit in the spiritual court, it behoveth the devisee to have a citation against the executor of the testament, to appear before the ordinary, to shew why he performs not the will of the testator. *Terms of the L. Devise.*

And although certain goods in specie are given to a man by will, yet he cannot take them without the executor's assent: so if a term for years be so given to him, he cannot enter into the land without such assent: for it may be, the executor hath not assets besides, to pay the testator's debts. *Law of Ex.* 262.

Yea, if a man do bequeath goods to another, which are in the custody of that other person; yet if he detain them from the executor, (who hath not assented to the legacy,) the executor may have an action of detinue or trespass, or of trover, after demand of the goods, against the said legatee. *Law of Ex.* 263.

But in the case of a devise of *lands*, the devisee may enter without the assent of the executor; and if the heir at law should enter before him, the devisee may enter and eject him. 1 *Inst.* 111.

For seeing that an inheritance devised is not demandable in the ecclesiastical court, but in the temporal; therefore the legatary, according to the devise, without farther assignment or delivery, may enter into the same after the death of the testator. *Swin.* 19.

But if *chattels real*, as a lease, be bequeathed by will, a man may sue for the same in the court ecclesiastical. *Swin.* 19.

If a legacy be granted *out of lands* in fee-simple; this shall not be sued for in the spiritual court: But if land be devised to be *sold for payment of legacies*, the land being sold, the suit for the money to be distributed may be in the spiritual court; for the money is personal, and assets in the hands of the executors, so as it savours not of the realty being executed. *Cro. Car.* 396, 397. *Brownl.* 32.

But where a man deviseth that his executors shall sell his lands, and out of the money which shall be raised by sale, giveth a *portion to his daughters*, it hath been adjudged, that neither the land nor money is testamentary; for it is not assets to satisfy debts, but a sum arising of land, and appointed to special uses in way of equity, and not as a legacy, and therefore not to be sued for in the ecclesiastical court, but in a court of equity: and the ecclesiastical court cannot hold plea of a legacy in equity, but where it is a legacy in law indeed. *Cro. Car.* 395, 396. *Swin.* 2. 19.

So,

So, if a man devise lands to be sold for the payment of debts, and dispose of the *surplus* to several persons; that cannot be sued for in an ecclesiastical court, but only in a court of equity: because that is not a legacy merely of goods and chattels, but it ariseth originally out of lands and tenements; and they have a testamentary jurisdiction touching chattels only. *Str.* 672.

So, where the testator devised a legacy to one, to be paid out of the *profits* of his land, and he deviseth those very lands to his executor for a term of years, and died; adjudged, that this was a temporal matter, and not testamentary, because the legacy was to arise out of the profits of the lands. *Swin.* 20.

But where the testator devised *leases* to his eldest son, and that out of the same he should raise such a sum of money for portions for his daughters, who libelled in the spiritual court for their portions, it was adjudged, that this should not be accounted as a rent issuing out of the lands, but as a testamentary legacy, and to be recovered in that court. *1 Bulst.* 153.

M. 2 An. Ewer and Jones. It was held by Holt chief justice, clearly, that a devisee may maintain an action at common law against a tertenant for a legacy devised out of land; for where a statute, as the statute of wills, gives a right, the party, by consequence, shall have an action at law to recover that right. *2 Salk.* 415.

But the usual remedy in such like cases, is in equity. *3 Salk.* 223.

It is said, that where the ecclesiastical court and a court of equity have a concurrent jurisdiction, which ever is first possessed of the cause has a right to proceed: and the same of all other courts. But where the husband hath sued in the spiritual court for a legacy given to the wife, the court of chancery hath granted an injunction to stay proceedings; because the spiritual court cannot oblige him to make an adequate settlement on her. *Prec. Cha.* 546.

So, where a personal legacy was given to an infant, it was held, that the same is more properly cognizable in chancery than in the ecclesiastical court; and if the matter had proceeded to sentence in the ecclesiastical court, yet it was proper to come into chancery for the executor's indemnity; for, in the chancery, legatees are to give security for the money, but not in the spiritual court; and the chancery will see the money put out for the children. *1 Vern.* 26.

So, where there is a trust, or any thing in nature of a trust, notwithstanding the ecclesiastical court hath an original jurisdiction in legacies, yet the chancery will grant an injunction to stay the proceedings in the ecclesiastical court; *trusts being properly cognizable only in equity.* *1 Atk.* 491.

So, where a will is suppressed or destroyed, the suit for a personal legacy may be in equity in the first instance, without resorting to the spiritual court; otherwise it would put the plaintiff upon great difficulties: for, in the spiritual court, the plaintiff must prove it a will in writing, and must likewise prove the contents in the very words, and must also prove the whole will, though the remainder of it doth not at all belong to, or regard his legacy: which the temporal courts do not put a person upon doing. Much more, when the legacy is charged both

both out of personal and real estate; for as to the real estate, there is no occasion to resort to the ecclesiastical court at all. 3 *Atk.* 361.

Legacies may be recovered in the spiritual court against an *administrator with the will annexed*, or against an *executor of his own wrong*. 1 *Roll's Abr.* 919.

Where the executor, being sued in the spiritual court for a legacy, pleads the legatee's release, and that court tries the validity of that release, the common law will not prohibit them, provided they try it by the rules of the common law; because they have jurisdiction of the legacy, which is the original cause. 2 *Roll's Abr.* 307.

But where *plene administravit* was pleaded in the spiritual court, and proved by one witness, which they would not allow, a prohibition was granted. *Het.* 87.

So, where an executor, being sued for a legacy in the spiritual court, pleaded the plaintiff's release, which was disallowed there, because the witnesses were dead, and that court refused to allow circumstantial proofs of the release; a prohibition was granted. 2 *Roll's Abr.* 302.

In this state, the ordinaries having no power to enforce their decrees, no suits are instituted before their tribunals for the recovery of legacies; but the parties, if the executor will not pay or satisfy their demands, under the will, are under the necessity of commencing a suit in the court of equity, the expences of which must be frequently more than the amount of the legacy, or at least more than the estate can afford: it therefore becomes the duty of the legislature of this country, immediately to authorize the courts of common pleas to entertain such suits, especially as no inconvenience whatever would result from a law of this kind. And indeed actions have been brought, with the assent of the executor, in the common pleas, which is a sufficient proof that such suits may be commenced and carried on with propriety in that court; and that it will be a considerable saving of unnecessary expence to the citizen, the great difference of the charges in a suit in equity, and of one in the common pleas, sufficiently evinces.

4. An executor may, in some cases be compelled to give security to pay a legacy; as where £1000. was devised to a person to be paid at the age of 21 years; and upon a bill exhibited against the executor, suggesting a *devastavit*, and praying that he might give security to pay the legacy when due, it was decreed accordingly. 1 *Cha. Ca.* 121.

The testator devised £800. to an infant, to be paid by his executor when the said infant should attain to the age of 21 years. The infant, by his guardian, exhibited a bill, that the executor might give security for the payment of the money. And so it was decreed. *Swin. a.* 40. *Law of Ex.* 187.

The testator bequeathed his personal estate to his wife for life, and what she should leave at her death to be equally distributed between his own kindred and her's. If the estate be so small, that she cannot live upon it without spending the stock, it seems she shall not be obliged to give security; otherwise she shall. *Prec. Cha.* 71.

H. 11 *Ja. Prowe's case*. If a person, possessed of a lease for years, devise that his executor, out of the profits thereof, shall pay to every

one of his daughters £20. at their full age; the executor may be sued in the spiritual court, to put in surety to pay the legacies, and no prohibition shall be granted; for this is to issue out of a chattel. 2 *Roll's Abr.* 285.

But in the case of *Palmer and Mason, M. 1737.* Where £500. was given to the grand-daughter, to be paid at 21 or marriage; and if she died before either of those contingencies happened, then to go over to another: It was said by lord Hardwicke, as the legacy was devised over, nothing vested in the grand-daughter till one of the contingencies should happen; and therefore she was not entitled to have the legacy secured. 1 *Atk.* 505.

5. Mr. *Wentworth* says, in case an infant be of the age of discretion, to wit, fourteen years, he holdeth it clear, that the payment of a legacy to him made will stand good, whether he who makes such payment have any acquittance or not; for if he have proof of the payment, he is well enough acquitted from any second payment. *Went.* 219.

And he thinks, on demand and acquittance tendered, he ought to pay it to an infant of tender years (in presence of his guardian); payment, according to the testator's appointment, being the matter which acquitteth the payer. *Went.* 220, 221.

And Mr. *Clerke* says, if a legacy be left to an infant under seven years of age, the father (or next of kin) shall apply to the judge before whom he intends to sue for the legacy, and alledge, that such a person deceased made his will, and appointed such a one executor, and in the said will bequeathed unto his son, being an infant (under seven years of age) such a legacy; and that, by reason of such age, the said infant hath not a person able and fit to sue for the same; and shall implore the office of the judge in that behalf, and request that curators be assigned to the infant, to sue for and recover the said legacy from the executor: Whereupon the judge usually assigneth such father or next of kin to be curators in that behalf. 1 *Ought.* 357.

But if the minor is above seven years of age, the judge doth not ex officio constitute a curator, but the minor is to choose one, either personally, or by commission (as in case where he lives at a great distance, or otherwise,) or sometimes by special proxy under his hand and seal, requesting that such curator may be assigned by the judge as aforesaid. *Id.* 358, 359, 360.

And if the executor, on suit of the minor by such curator as aforesaid, pay to the curator the legacy due to the minor, he is discharged from any further payment thereof to the minor when he comes of age; although the curator never pay it to the minor, or shall become insolvent: And the reason is, because he pays it by the decree of the judge. And therefore it is adviseable for the executor not to pay the legacy until suit hath been commenced against him by the curator, and he the said executor hath been cited; and then let him offer to pay the legacy *judicially*, that is, according to the forms of the court; and the same being entered in the acts of the judge, the executor is discharged. *Id.* 362, 3.

And in this case the judge is not wont, nor is obliged, to deliver the legacy to the curator for the use of the minor, until he hath given cau-
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tion for the indemnity of the judge and of the excutor in this behalf, and for the payment thereof to the minor when he shall come of age. *Id.* 363.

When suits have been commenced in the court of chancery, by guardians for infants' legacies, and executors, pursuant thereto, have paid the money into court, they have been indemnified against any future claim. *Lovelass*, 212.

As in the court of chancery, in the case of *Bullen and Allen*, T. 28 C. 2. An infant exhibited a bill by his guardian, for a legacy of £100. devised to him. The defendant, by his answer, confessed the legacy, and that he was always ready to pay it, so as he might be lawfully discharged, which the plaintiff, by reason of his infancy, could not do; and therefore insisted that it might be paid without interest. Which was decreed accordingly, and the defendant to be indemnified. *Cha. Ca. Finch*. 264.

And in the case of *Dyke and Dyke*, H. 25 *Cha. 2.* Where legacies were devised to infants payable at a certain time, which expired during their infancy, and the executor refused to pay the same, because the legatees could not give any discharges, by reason of their infancy; it was decreed, that the master should put out the money at interest in the name of the guardian, or of such other person as he should think fit, and that the defendant should be indemnified against the infants. *Cha. Ca. Finch*. 95.

In the case of *Holloway and Collins*, H. 26 and 27 C. 2. A legacy of £125. was given to the plaintiff, being but ten years old, and at that age was paid to the plaintiff's father, who died insolvent. This was held by the lord keeper to be good payment: but the attorney general urged very much the ill consequence of this; for the law must be the same if it were £1000. and extends to other cases of like nature, not to legacies only; and said, that the executor ought to have sued in this court to have paid it. And the lord keeper said, it may be so where the legacy will bear the charge of suit, but not otherwise. But the executor having taken a bond to save him harmless, it was decreed that he should pay it over again, for he had paid it at his own peril. *Cha. Ca.* 245.

But in the case of *Strickland and Hudson*, E. 7 An. Lord chancellor Cowper said, that the master of the rolls, who had longer experience than himself, would never allow a child's legacy to be paid to the father or mother upon any security whatever, by reason of the strife it might occasion in a family. 3 *Cha. Ca.* 168.

And in the case of *Doyley and Tollferry*, M. 1715; a legacy of £100. was devised to an infant of about ten years of age: The executor paid this legacy to the father, and took his receipt for it. When the infant came of age, his father told him he had received the legacy, but could not pay it him immediately, and said he would not have him trouble the executor, for he would give it him. The son rested satisfied with this for about fourteen or fifteen years, and his father and he having carried on a joint trade together, became bankrupts. This legacy of £100. being amongst other things assigned by the commissioners for the benefit of the creditors, the assignee brought a bill against the executor

executor for an account and payment of this legacy. The defendant insisted on the extreme hardship of his case, if he should be obliged to pay the legacy over again; that he had justly paid it to the father, whilst he was in good circumstances; and that if application had been made sooner, he might have had his remedy over against the father; that the father was, by nature, guardian to his child; and that formerly payment to him was allowed to be good. The lord chancellor said, that if the father had not made the son such promise of recompence, and the son had acquiesced all that time, the case might have been more doubtful; but this promise of the father drew him to forbear applying to the executor sooner; and since the father had not and could not now make good his promise, being a bankrupt, the reason of the son's forbearance was at an end; he thought the rule of this court, in not suffering parents to receive their children's legacies, was founded on very good reason; and therefore, lest hereafter this case should be cited as a precedent, when the circumstances attending it might be forgot, and to discountenance and deter others from paying such legacies to the parents (though he did not deny the hardship of that particular case) he decreed for the plaintiff against the executor. *1 Abr. Cas. Eq. 300.*

3 *Bac. Abr.* 484.

Nov. 11, 1740; *Philips and Paget*. Mrs. *Paget*, by her will, gives a legacy of £100. to each of the three children of Mr. *Philips*, and makes the defendant her executor, leaving him the bulk of her estate, provided he pays the three legacies of £100. within a year after her death, pursuant to her will. The defendant, within the time, pays to the children's own hands their legacies. The eldest of them was 16 years old at the time, the next 14, and the youngest 9 only. And in his answer he denies that he knows this money ever came to the father's hands. But the children have now brought their bill against the defendant, to be paid their several legacies, suggesting that their father had embezzled the money paid by the defendant during their infancy, and is insolvent; and that this was a fraudulent payment to the father, and therefore it must be paid over again. Lord Hardwicke asked the counsel for the defendant, if they knew any instance where an executor, paying so large a sum as £100. into the hands of minors, had been allowed such payments; indeed, in cases where the legacies have been very small, the payment has been allowed by the court. But in this case, notwithstanding the sum is above £100. yet, as the payment by the executor to the children themselves is so fully proved, and not at all controverted by the plaintiffs, and their losing the benefit of it is owing to the negligence and insolvency of the father, I will not strain the rules of this court to make an executor pay it over again; especially as he made this payment to save a forfeiture, it being an express condition of his own taking under the will, that he should discharge their legacies within a year after Mrs. *Paget's* death. But the next day the lord chancellor said, that upon looking into the cases, he found this is a very doubtful point; and unless the defendant will agree to give the plaintiffs something, he would not determine it, without taking time to consider it. The defendant, upon this recommendation of the court, agreed to pay in £50. to be divided between the three

three plaintiffs; and each side were to abide by their costs; and it was made part of the decree, that the £ 50. was paid by consent of all parties. And his lordship directed each of the plaintiffs, upon receiving their respective shares, to release the legacies under the will. The case of *Doyley and Tollferry*, he said, must have had some other circumstances; for the rule is laid down too strictly, that in all cases where executors pay infants' legacies to their fathers, in order to deter executors from such payments, it shall be paid over again. Lord Cowper confirmed the decree of the master of the rolls in that case; but he seemeth to have had a remorse of judgment at the time; for in the register's office it appears, his lordship ordered the deposit to be divided between the parties. 2 *Atk.* 80.

And in the case of *Rotheram and Fanshaw*, March 25, 1748; lord Hardwicke said, *arguendo*, that where a suit is instituted in the spiritual court, for an infant's legacy, by a father, to have it paid into his hands, the court will grant an injunction; because it will not allow the infant's money to come into the father's hands. 3 *Atk.* 629.

6. Nov. 4, 1684. *Palmer and Trevor*. Morley devised £ 100. to his daughter Eliz. Palmer, a feme-covert, and dies. The executor pays it to Elizabeth, who spends it in her own maintenance. Her husband sues for it; and the question was, whether this was a good payment to the wife; it being in proof, that, at the time of making the will, Palmer and his wife lived apart, and the husband did not allow her maintenance, and so it is a strong presumption that the deviser intended this for her separate use. By the lord keeper: If it had been so given in express terms, the payment to her had been good; but as it is, the husband must have it decreed: he said, that in case where a tenant paid his rent to his landlady, not knowing that she was married, yet the husband made him pay it over again, and no help for it. Moreover, the will appointing the legacy to be paid within six months after the testator's decease, the lord keeper decreed the husband interest from that time; but if no time limited, no interest. 1 *Vern.* 261.

Thomas Boone and Mary his wife, v. James Sinkler, executor of Levi Durand. Action for legacy. The jury in the above case found the following special verdict: "We find, that the testator, *John Boone*, in and by his last will and testament, duly executed, did, amongst other things, devise and bequeath as follows:—'Item, I give and bequeath the remainder or residue of my estate, including the negroes given to my mother, and not otherwise disposed of, with all their increase, to my brother, *Capers Boone*, and my nephew, *Levi Durand*, and their heirs, to be equally divided between them; out of which I will, that each of them shall pay to my niece, *Mary White*, daughter of *James White*, the sum of £ 4000. And I do further will, that the money remain in their hands, they paying her the interest half yearly: and I do further will, that the money be paid to her in one year after she is married; and in case she dies before marriage, I then give her full power to dispose of it, by will, as she pleases.' And of the said last will and testament appointed the said *Capers Boone* and *Levi Durand* his executors; who possessed themselves of the estate so devised to them, and more than sufficient to discharge the legacy charged thereon. We also

also find, that the said *Levi Durand*, after the death of the said testator, to wit, in the month of October, 1779, paid his part of the said legacy to the said *Mary White*, she being then, and at the time of the making of the will, of full age and unmarried, and received from her a receipt for the same, which is now lost. We also find, that, after the said payment of the said legacy, the said *Mary White* intermarried with the plaintiff, *Thomas Boone*; and if the court shall be of opinion for the plaintiffs, that the said payment and receipt were void, then we find for the plaintiffs; if not, then we find for the defendants, with costs of suit. July 8, 1793."

In this case the court were unanimously of opinion, that the legacy to *Mary White* was a legacy which vested in her as soon as the testator died; and that she, being of age, had a right to receive; and that the executor was justifiable in paying her the amount of the said legacy.

7. The courts, both ecclesiastical and temporal, have allowed interest to be paid for legacies withheld in certain instances. And, generally, it is said, if a legacy be bequeathed to be paid divers years after the testator's death, this difference is to be observed; if the day were given in favour of the legatee being an infant, who could not safely receive it any sooner, then he shall have the profit; but if the respite was in favour of the executor, then the legatee shall have the bare legacy without interest. *Wentw. 352.*

M. 1727. Bilson and Sanders. A legacy was given to an infant, the testator having a great deal of money in bank stock. The executor was residuary legatee. A bill was brought in the exchequer for the legacy. And the question was, whether it should bear interest, and from what time? Chief baron Pengelly and baron Hale; it is a certain rule, that where a fund is certain, as where charged on land, it shall bear interest, because it plainly appears the rents are received: So the fund on which it is charged produces a profit here, it is equally certain, and therefore should bear interest, and should be from the testator's death. But this was opposed by Carter and Comyns, barons, that it should only bear interest from a year after the testator's death; for as legacies are to be paid after debts, the executor has that time to inquire, till which time they are not payable, so not to bear interest: which was agreed. A difference was offered to be made, that as there was a legacy to an infant, it could not be safely paid, and therefore could not bear interest. To which it was answered by the chief baron, that it might be safely paid into the hands of an infant, having proper evidence of the payment, as in *Wentworth's Executor*, 313. And by Carter; it may be paid into the hands of the guardian, having evidence; but if he takes security from the guardian which should prove defective, there, as he doth not rely on the security the law gives, he must depend on that taken at his peril. *Select cases in chancery*, 72. *Bumb. 240.*

June 22, 1743. *Butler and Freeman.* The grand-father of the plaintiff, by will, after directing his debts and legacies to be paid, gives all the rest and residue of his personal estate to his grand-son, the plaintiff, at his age of 21, and if he die before that age, then to the defendant, *Freeman*, whom he makes his executor. The plaintiff brought his bill for the interest of the residue, to be paid to him during

ing his infancy. The defendant, Freeman, by his answer, insisted, that the plaintiff is not entitled to it, unless he attains his age of 21; but that it ought to accumulate; and if the plaintiff dies before 21, that it will equally belong to the defendant with the residue. The father of the plaintiff insisted, that the residue must be confined to what the testator left at the time of his death, and that the interest made after his death ought to be considered as an undisposed part, and go to him as next of kin to the testator, according to the statute of distribution; or if the court should be against him in this point, that then he is entitled to receive it for the maintenance of the plaintiff. By the lord chancellor Hardwicke: I am of opinion, that the plaintiff is not entitled to the interest that arises from this residue; and though the words *rest and residue* must be confined to what shall be found at the death of the testator, after his debts, funeral expences, and legacies are paid, yet that the interest ought to accumulate till the plaintiff arrives at his age of 21, and as often as it amounts to a competent sum, to be placed out by a trustee appointed by the master. I am not quite so clear how the interest would go, if the accident should happen of the plaintiff's dying before 21, whether to the representative of the plaintiff, or to the defendant, Freeman; but that is not necessary to be inquired into at this time. As to the father's claim, I am of opinion he has no right to the interest, because the testator has given *all the rest and residue* of his personal estate, so that he cannot be said to have left any part undisposed, and consequently can have no title to it as next of kin under the statute of distribution. For as the devise of the residue is contingent, it not vesting till the grand-son's age of 21, the interest is so likewise, and must accumulate in the mean time; nor can the father, by the rules of this court, entitle himself to it as maintenance for the infant, because it is given by a grand-father to a grand-son upon a contingency of attaining his age of 21; and as nothing is said how the produce of it shall be applied, he is not entitled, as a grand-son, to be maintained out of the produce. The law of nature obliges only fathers to maintain their children; and unless the child, from the mean circumstances of the parent, is in danger of perishing for want, the court will not direct the interest that shall be made of a contingent legacy to be applied for that purpose: So that unless the parent is totally incapable, or under particular circumstances, as having a numerous family of children, and is bordering upon necessity, the law of the land and of nature make it incumbent on the parent to maintain his child. In the case of *Atcherly and Vernon*, 1 P. Will. 783. where the testator, Mr. Vernon, had left £6000. to the plaintiff, his niece, to be paid to her at her age of 21, and she insisted that the interest of this money ought to be allowed for her maintenance; lord Macclesfield was of opinion, that the interest in that case ought to follow the principal, for it was a vested legacy, and payable at 21. But there it was a sum of money separated and detached from the rest of the estate, and a vested legacy; here it is a contingent one, and not a specific sum, but of the residue of his personal estate, which makes a difference between the cases; and the father likewise in the present case possessed of a good estate, and in considerable circumstances. Therefore his lordship decreed the interest which has
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arisen upon the residue of the testator's personal estate since his death, or which may arise, to be paid into the hands of a trustee, to be laid out in real or government securities, as often as it shall amount to a competent sum. 3 *Atk.* 58.

July 2, 1744; *Heath and Perry*. The testator, by his will, gave £1000. apiece to five brothers and sisters, (but who were no relations to him) to be paid to them at their respective ages of 21, in case they should respectively attain that age, and not otherwise; and if any of them should happen to die before they attain their respective ages of 21, that then, and in such case, the legacy or legacies of £1000. so given to them respectively, shall be void. The legatees brought a bill for interest on their legacies. By lord Hardwicke: cases of this kind, how far a legatee, who is not entitled to the payment of the legacy immediately, shall have interest in the mean time, depend upon particular circumstances. Some upon relationship, some upon the necessities of legatees, and most of them upon the particular penning of wills; and there is hardly one case which can be cited that is a precedent for another. Some things are certain in these cases; for if a legacy is given generally at marriage, or at 21, then the vesting and time of payment are the same, and shall not vest till marriage or 21. To go one step further, where a legacy is actually vested, as if given to an infant, payable at 21, yet it shall not carry interest, unless something is said in the will, that shews the testator's intention to give interest in the mean time. But all these cases are subject to this exception, if it is in the case of a child; for then, let a testator give it how he will, either at 21, or at marriage, or payable at 21, or payable at marriage, and the child has no other provision, the court will give interest by way of maintenance; for they will not presume the father so unnatural as to leave a child destitute. But in the present case, the legatees are mere strangers to the testator; and nothing shall be taken out of the estate for their benefit during their nonage. 3 *Atk.* 101.

Supposing interest to be due, another question arises, from what time the interest shall accrue. Concerning which, in the case of *Jolliffe and Crew*, E. 1701, it was determined as follows, viz. If a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the expiration of the first year after the testator's death: but it seems a year shall be allowed, for so long the statute of distribution allows before the distribution be compellable, and so long the executor shall have, that it may appear whether there be any debts. But if the legatee be of full age, he shall only have interest from the time of his demand after the year; for no time of payment being set, it is not payable but upon demand; and he shall not have interest but from the time of his demand: otherwise it is in case of an infant, because no laches are imputed to him. But where a certain legacy is left payable at a day certain, it must be paid with interest from that day. 2 *Salk.* 415. *Préc. Chan.* 161.

And in the case of *Maxwell and Wettenhall*, T. 1723, the following points were resolved: 1. If one gives a legacy charged upon land, which yields rents and profits, and there is no time of payment mentioned in the will, the legacy shall carry interest from the testator's death,

death, because the land yields profit from that time. 2. But if a legacy be given out of a personal estate, and no time of payment mentioned in the will; this legacy shall carry interest only from the end of the year after the death of the testator. 3. If a legacy be given, charged upon a dry reversion, here it shall carry interest only from a year after the death of the testator; a year being a convenient time for sale. 4. If a legacy be given out of a personal estate, consisting of mortgages carrying interest, or of stocks yielding profits half yearly; it seems, in this case, the legacy shall have interest from the death of the testator. 5. If a legacy be brought into court, and the legatee hath notice of it, so that it is his fault not to pray to have the money, or that the money should be put out; the legatee, in such case, shall lose the interest from the time the money was brought into court: but if the money was put out, the legatee shall have the interest which the money put out by the court did yield. 2 *P. Will.* 26.

As to the *quantum* of interest, the determinations have been various: In the case of *Guillam and Holland*, Oct. 14, 1741; lord Hardwicke said, where a portion is charged upon land, and the will doth not mention interest, the court will not give any more than 4 *per cent.* though the legal interest is 5 *per cent.* and this rule hath also been extended to the cases of legacies and portions charged upon personal estate. 2 *Atk.* 343.

In the case of *Incliden and Northcote*, March 2, 1746; lord Hardwicke said, at first, as no more had been allowed for many years than 4 *per cent.* interest to children for maintenance, he did not care to break through the rule: But afterwards, in consideration of the interest of money being altered lately, mortgages being then at four and a half, and several at five *per cent.* he ordered the children should have four and a half *per cent.* interest. 3 *Atk.* 438.

In *Bryant and Speke*, Dec. 6, 1748; lord Hardwicke said, the general rule is, that legacies out of real estate carry one *per cent.* lower than legal interest; but if out of personal estate, because of the higher interest of money than land, it shall carry the legal interest, unless particular circumstances induce the court to vary therefrom. And this, he said, was in conformity to the ecclesiastical court, which gives legal interest upon legacies out of personal estate. 1 *Vez.* 171.

In *Beckford and Tobin*, Nov. 4, 1749; it was said by the lord chancellor Hardwicke, that in general the court exercises as large a discretion, as to the rate of interest upon legacies, where interest is not particularly given, as in any case; and that it is difficult to reduce it to a certain rule. The most general rule hath been, between interest of legacies charged on land, and on personal estate; and where nothing more, the court has said, that land never produces profit equal to the interest of money, and will follow the course of things, and give interest, where charged on land, 1 *per cent.* lower than the legal interest. So it was when the legal interest was at six; but in general, where a legacy is out of personal estate, the court gives five; and unless that is taken to be a sort of rule, there will be no distinction between them.—Nevertheless, in the present case, the fund out of which

the interest was to arise, yielding no more than four, the court allowed but four *per cent.* 1 *Vez.* 308.

M. 1733. Ferrers and Ferrers. The countess dowager of Ferrers was, by settlement and will of her late husband, earl Robert, entitled to a jointure estate of £1000. a year, but was kept out of possession by earl Washington, the son of earl Robert by a former venter; and now insisted upon the arrears, and interest, from the time of her husband's death; comparing it to the case of arrears of an annuity, or rent charge, which are decreed to be paid with interest. By Talbot lord chancellor: The arrears of an annuity or rent charge are never decreed to be paid with interest, but where the sum is certain and fixed; and also where there is either a clause of entry, or nomine pœnæ, or some penalty upon the grantor, which he must undergo, if the grantee sued at law; and which would oblige him to come into this court for relief, which the court will not grant but upon equal terms, and those can be no other but decreeing the grantor to pay the arrears, with interest for the time during which the payment was withheld; but interest for the rents and profits of an estate was never decreed yet, the same being entirely uncertain. And though it may be said, that the lady is entitled to an estate of £1000. a year, yet that is not sufficiently certain; being only a perception of the profits of an estate, which are not to be paid at any one certain time, but only as the tenants of the land bring them in, some at one time, some at another. *Cas. Talb. 2.*

In the case of *Chaworth and Hooper, T. 1780*; where there was a devise of the residue to an infant, payable at 21, with a remainder over, in case of her dying under that age; the question was, whether, as the infant died under age, the interest, from the death of the testator to that of the infant, should go to the infant's representative, or to the remainder man; that is, the person to whom devised, in case of the infant's dying under 21. By baron Eyre, for lord chancellor: the whole residue is here given to the infant. What is to become of the produce? Where would the use be if it was a specific thing, or the rents of it was land? The interest is the natural produce. It is not a charge upon any body. The produce must go to the person who has the thing liable to be divested: when divested, it must, from that moment, go to the person who comes in. And it was decreed accordingly. *Brown's Cha. Rep. 82.*

8. *M. 16 C. 2. Rennsey and Parrot.* A legacy was made payable at the age of twenty-one years. The legatee, by his guardian, brought a bill against the executor for maintenance, suggesting that he had none. The executor demurred; for that the plaintiff was under age, and the legacy was not payable till twenty-one, and therefore no cause of suit. But the demurrer was over-ruled. 1 *Cha. Ca. 60.*

E. 1722. Harvey and Harvey. The testator, being seised of a real estate, and possessed of a personal estate, and having several children, deviseth all his real and personal estate to his eldest son, charging the same with £1000. a piece to all his younger children, payable at their respective ages of 21; but in the will no notice is taken of maintenance for the younger children in the mean time. The younger children bring their bill, in order to recover interest, or some maintenance during their infancy.

infancy. Upon which, the master of the rolls decreed, that the younger children should recover maintenance. He observed, that these being vested legacies, and no devise over, it would be extreme hard that the children should starve, when entitled to so considerable legacies, for the sake of their executors or administrators, who, in case of their deaths, would have the said legacies: That, in this case, the court would do what in common presumption the father (if living) would and ought to have done, which was, to provide necessities for his children: That a court of equity would make hard shifts for the provision of children; as where younger children were left destitute, and the eldest an infant, equity would make such a liberal allowance to the guardian of the eldest, as that he might thereout be enabled to maintain all the children; and for the same reason, the court would likewise take a latitude in this case; that since interest was pretty much in the breast of the court, though the will were silent with regard to that, yet it should be presumed that the father, who gave these legacies, intended they should carry interest, if the estate would bear it; for every one must suppose it to have been the intention of the father, that his children should not want bread during their infancy: That for this reason it had been held, that though a legacy were devised over in case of the legatee's dying before twenty-one, yet the infant legatee ought to have interest allowed him during his infancy, in order for his maintenance; with this difference only, that where the estate has appeared to be small, the court, in whose discretion it always lies to determine the quantum of interest, has ordered the lower interest: And it seemeth, that if one, not a parent, gives a legacy to an infant, payable at twenty-one, without any devise over, and the infant has nothing else to subsist on, the court will order part of this legacy, in order to provide bread for the infant, to be paid presently, allowing interest for the same to the person paying it, out of the remaining principal; though this is done very sparingly. 2 P. Will. 21.

M. 1684. *Barlow and Grant.* Upon a bill for £100. legacy given to a child, the defendant insisted upon an allowance of £16. a year, for keeping the legatee at school. It was objected, that only the bare interest of the money ought to have been expended in his education, and not to have sunk the principal, as in this case the defendant had done. But the lord keeper thought it fit and reasonable to be allowed; and said, the money laid out in the child's education was most advantageous and beneficial for the infant, and therefore he should make no scruple of breaking into the principal, where so small a sum was devised, that the interest thereof would not suffice to give the legatee a competent maintenance and education; but in case of a legacy of £1000. or the like, there it might be reasonable to restrain the maintenance to the interest of the money. 1 Vern. 255.

But if the legacy is devised over, it seemeth to be otherwise; and that the court, in such case, will not diminish the principal, but only allow the interest thereof to the first legatee, until the time that the legacy shall become payable. 1 Cha. Ca. *Leech and Leech.* H. 26 and 27 C. 2. *Prec. Cha.* 195. *Brewin and Brewin.* E. 1702.

Also, a legacy in the hands of the father, given to his children by a relation

a relation or other, shall not be diminished by the father; because he is obliged to maintain his own children: as in the case of *Darley and Darley*, Dec. 6, 1746. A bill was brought by the plaintiff, for two legacies, of £ 50. each, left to himself and his sister, under the will of their grand-father, and for the interest that has been made thereof. The sister's legacy he claims by assignment from her. The defendant, being executor to the father, insists he is not obliged to account to the plaintiff for principal or interest, one hundred and five pounds being expended for putting him out apprentice, and much more than fifty pounds in the maintenance and cloathing of the sister. By the lord chancellor Hardwicke: Where legacies are given to a child by a relation, a father cannot make use of such legacy in maintenance of the child, but must provide for him out of his own pocket: nor can he set him out in the world, or put him out an apprentice, or clerk, with the money arising from the legacy; and if he does, he shall not be allowed it. And he ordered interest to be computed on the legacies given to the plaintiff and his sister, from the time they respectively attained their ages of 21, at 5 *per cent.* and that what shall be found due for principal and interest of these legacies, be paid by the defendant to the plaintiff, he having admitted assets of the father for that purpose. 3 *Atk.* 399.

9. In the case of *Grove and Banson*, M. 21 *Cha.* It is said generally, that an executor is not bound to pay a legacy without security to refund, in case there be a defect of assets. 1 *Cha. Ca.* 149.

And in the case of *Noel and Robinson*, M. 1682. It is said, that if they give sentence in the ecclesiastical court for the payment of a legacy, a prohibition will lie, unless they take security to refund, in case of insufficiency of goods to discharge debts, and the like; for a diminution of legacies is to be made *pro rata*, if the testator's estate will not extend to pay them all. 2 *Ventr.* 358. 3 *Bac. Abr.* 483. *Ayl. Par.* 343.

And Mr. Oughton says, if the testator hath given bond, with any person, for the payment of a debt after certain years to come, or for the performance of any covenants or contracts at a future day; although the executor, in this case, hath goods in his hands sufficient to pay the legacies, yet, if the said sum for which the testator was bound is not paid, or the said covenants be not fulfilled, in such case, the executor, for his indemnity, may offer judicially the legacy upon this condition, that the legatary first give proper security to keep him indemnified, with respect to the debts and covenants aforesaid, at least proportionably, regard being had to the other legacies. Which, if the legatary shall refuse, the executor may leave the same with the register upon the condition. 1 *Ought.* 369, 370.

The form of which security to be given as aforesaid may be this:

"Know all men by these presents," &c. (as in the common form of bonds.)

"Whereas E. F. late of —, deceased, did, on the — day of —, duly make and execute his last will and testament, and did therein, amongst other legacies, give and bequeath unto the above bounden A. B. the sum of —, and therein and thereof did name and appoint
"the

“the above named C. D. executor, who hath proved the same in the court of ordinary of — district, and taken upon himself the execution thereof: And whereas the said C. D. hath, at the request of the said A. B. actually paid to him the said A. B. the whole legacy of —, although there may be cause to apprehend a deficiency of assets for payment of the other legacies: The condition of this obligation is such, that if such deficiency shall actually and bona fide happen, the said A. B. his executors or administrators, shall, within — days next after request in that behalf to him made, refund and pay back unto him the said C. D. his executor or executors, administrator or administrators, his or their rateable part or share of such deficiency, then this obligation to be void, otherwise of force.”

And in a court of equity, common justice will compel a legatee to refund, although no security hath been given for that purpose. 1

Vern. 93, 94.

And by the lord chancellor Hardwicke; legatees are not obliged to give security to refund upon a deficiency of assets. 1 *Atk.* 491. 1

Vez. 342.

And the rule is, where an executor pays a legacy, the presumption is, that he hath sufficient to pay all legacies, and the court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund; although, if the executor prove insolvent, so that there is no other way, the court will admit a bill by the other legatees to compel that legatee to refund.

2 *Vez.* 194.

If the legatees have been paid their legacies, they are afterwards obliged to refund a rateable part, if debts should come in more than sufficient to exhaust the residue, after the legacies paid. 2 *Black. Com.*

512.

10. The ancient law was, that if a man bequeath £ 20. to one, and £ 20. to another, and £ 20. to a third, and makes his executor and dies, having goods but to the value of £ 20. in all; of which goods the executor maketh an inventory: in this case he may pay which of the three he pleaseth his whole legacy, and the other two are without remedy: or he may, if he please, pay every one of them a rateable part: and in case the executor make no inventory, yet he is chargeable no further than the value of the goods; and so, if every legatary in such case should sue him, they must prove sufficiency of goods, or otherwise they shall get nothing. *Curs.* 186.

But, Mr. Clark says, (agreeable to the rule in the courts of equity) if, after payment of the debts and funeral expences, there be not sufficient for all the legataries, there must be a proportionable distribution according to the quantity of each legacy. 1 *Ought.* 366.

And Dr. Swinburne says, if the executor do make an inventory according to the laws and statutes of this realm, then he need not pay to any legatary his whole legacy, though he be first named in the will, in case there is not sufficient to answer unto every legatary his whole legacy; but may retain a rateable part or proportionable deduction from every legacy; saving, in certain cases: whereof one is, when some special thing is bequeathed, as the testator's signet, or his white horse; which

which special legacy (as some do deem) is to be satisfied and paid wholly without diminution, in respect of any other general legacies, or of legacies which consist in quantity. Another case is, when the father doth bequeath something to his daughter for her dower, or towards her marriage. Another is, when the testator doth bequeath any thing in satisfaction or recompence for some injury by him done, or of goods evil gotten. For those legacies are not to be diminished by reason of other general legacies, or legacies consisting in quantity, which shall remain wholly unsatisfied, rather than those aforesaid legacies shall be diminished; and consequently, in these cases, it is not in the power of the executor to gratify any other legatary at his election. *Swin.* 227, 228.

And he says further, that if the executor enter to the testator's goods, and will make no inventory thereof, then may every legatary recover his whole legacy at his hands; for in this case the law presumeth, that there is sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same; whereas otherwise the executor is presumed not to have any more goods, which were the testator's, than are described in the inventory, the same being lawfully made. *Swin.* 228, 229.

And although the testator made no provision for refunding, yet the common justice of a court of equity will compel a legatee to refund; and it is certain, that a creditor shall compel a legatee, and that one legatee shall compel another to refund, where there is a defect of assets. *1 Vern.* 94.

And even, if one of the legatees get a decree for his legacy, and is paid, and afterwards a deficiency happens, the legatee who recovered shall refund notwithstanding. *1 P. Will.* 495.

But if the executor had at first enough to pay all the legacies, and afterwards, by his wasting the assets, occasions a deficiency; the legatee who has recovered his legacy shall have the advantage of his legal diligence, which the other legatees neglected by not bringing their suit in time. *Id.*

And although a legatee shall refund against creditors, if there be not sufficient assets to pay all the debts, and likewise against legatees, where all of them have not an equal share, in regard of assets falling short; yet it hath been said, that an executor himself shall never bring a legacy back when he hath once assented to it, unless he paid the debts of the testator by compulsion. *M.* 1682. *Noel and Robinson.* *1 Vern.* 90. *2 Ventr.* 358.

In case of a deficiency of assets, all the general legacies shall abate proportionably, in order to pay the debts. *2 Black. Com.* 512.

And the author of the *Law of Executors* saith; that if an executor voluntarily pay a legacy, and afterwards debts appear, he cannot compel the legatee in equity to refund. *Law of Ex.* 186.

But more particularly, the author of the *Law of Testaments* observeth, that if an executor applies the assets in satisfaction of legacies, and afterwards debts appear of which he had no notice at the time of paying the legacies, he may compel the legatees to refund. *1 Ch. Cas.* 136. So he may, if compelled by a decree in chancery to pay legacies: but if

if an executor *voluntarily* pays a legacy, and afterwards assets prove deficient to pay the other legacies; neither the executor, nor any of the other legatees, shall compel such legatee to refund. 2 *Vern.* 205. *Law of Test.* 260, 261.

But in the case of *Noel and Robinson* before mentioned, it was said by the lord chancellor, to be a point not as yet determined, whether the executor himself, after he hath once *voluntarily* assented to a legacy, shall compel the legatee to refund. 1 *Vern.* 94.

And in the case of *Davis and Davis*, E. 4 G. On a bill, by an executor against a legatee, to refund a legacy *voluntarily* paid him by the executor, the assets falling short to satisfy the testator's debts, it was decreed by Sir Joseph Jekyll, master of the rolls, that the defendant should refund to the plaintiff; and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid him, as well as a creditor; for the executor, paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against a legatee to compel him to refund. *Viner. Devis.* Q. d. 35.

So, where a *specific* legacy is devised, the legatee must have it intire, though there are not sufficient assets to pay the rest of the legacies: but if £100. is devised to one, and several money legacies to others, and the testator directs that the legacy of £100. shall be paid *in the first place*; yet, if the other legacies fall short, the legatee of £100. must make a proportionable abatement of this legacy. H. 1681. *Brown and Allen.* 1 *Vern.* 31.

In the case of *Blower and Morret*, July 10, 1752; lands were devised to trustees to be sold, for payment of debts and legacies; the testator afterwards gives to his wife a general legacy of £500. to be paid to her immediately after his decease, out of the first money that should be got in after his death. It was insisted, this £500. legacy should not abate in proportion with others, from the particular directions attending it. By lord Hardwicke: Cases of this kind, of a claim by pecuniary legatees of a priority of satisfaction, so as not to abate in proportion with others, seldom come before the court; and there are fewer, in which the court has given way to claims of that kind: there must be, therefore, very strong words to induce the court to give way to it; for in most cases, the court has disclaimed the laying weight on particular words, as the saying *imprimis* or *in the first place*, or a direction for the time of payment; because, if the court was, upon such grounds, to give a preference to one pecuniary legatee, there would be no end of it, considering the variety of expression and the incorrectness with which wills are frequently drawn. And I am of opinion, that the direction to be paid to his wife immediately after his decease, is not sufficient to give her a preference; for that only relates to the time of payment: he directs, that whereas the general rule of law is, that legacies should not be paid until a year, this shall be paid immediately. The consequence is, that if it is not then paid, it should carry interest immediately; which is always considered as a compensation for delay of payment, and puts her in the same condition as if it was paid. 2 *Vez.* 420.

In the case of *Oneale and Meade*, H. 1720. A man, seised of an estate

estate in fee, which he had mortgaged for £ 500. and *also* possessed of a leasehold, devised the mortgaged estate to his eldest son in fee, and the leasehold estate to his wife, and died, leaving debts which would exhaust all his personal estate, except the leasehold given to his wife. The question was, whether, there being (as usual) a covenant to pay the mortgage money, the leasehold premises devised to his wife should be liable to discharge the mortgage. It was decreed by the master of the rolls, that as the testator had charged his real estate by this mortgage, and also specifically bequeathed the leasehold to his wife, the heir shall not disappoint her legacy, by laying the mortgage debt upon it, as he might have done had it not been specifically devised; and though the mortgaged premises were also specifically given to the heir, yet he must take them with their burden, as probably they were intended; and that by this construction, each devise would take effect: and that this resolution did not in the least interfere with the case of *Clifton and Birt, M.* 1720; (1 *P. Will.* 678.) because in that case there was no mortgage. 1 *P. Will.* 693.

A specific legacy is not to abate, or allow any thing by way of abatement, unless there are not sufficient without it. 2 *Black. Com.* 512.

Legatees, on the bequest of *part* of a specific chattel, though not liable to abatement with general legatees, yet must abate proportionably amongst themselves, upon deficiency of specific things bequeathed, or on deficiency of general assets for payment of debts. So specific legatees of *distinct* chattels shall abate proportionably on deficiency of general assets. 1 *P. Will.* 540. Note 1. 4 edit.

Where the residue is not beyond the value of the legacies, the residuary legatee takes nothing. But in a case under special circumstances, where a testator meant the surplus as a legacy to his son, on a deficiency on assets, he was allowed to come in with the other legatees: yet of this case the present lord chancellor has expressed a disapprobation. 1 *P. Will.* 305, 6. Note 2. 4 edit.

And as there is a benefit to a specific legatee that he shall not contribute, so there is a hazard the other way; for instance, if such specific legacy, being a lease, be evicted, or being goods, be lost or burnt, or being a debt, be lost by the insolvency of the debtor; in all these cases the specific legatee shall have no contribution from the other legatees, and therefore shall pay no contribution towards them. 1 *P. Will.* 540.

But the devisee of an annuity for life, charged on the personal estate, where there is a deficiency of assets, shall abate in proportion with the other legatees; for this is not to be considered as a specific legacy. 3 *Atk.* 693.

Also charities, though preferred by the civil law, yet they ought to abate in proportion. 2 *P. Will.* 25.

And if the testator's personal estate is not sufficient to pay all legacies, the executors, having legacies bequeathed them, shall abate in proportion with the other legatees, even though the legacies be given them for their care and trouble, and not generally; for those are only words of course; and as they need not take upon them the office un-
less

less they please, they accept the legacies subject to that contingency. 2 *P. Will.* 25. *Barnard. Cha. Rep.* 435. 2 *Atk.* 171.

In like manner, land legatees and money legatees shall abate proportionably. 2 *Cha. Ca.* 155.

If the executor hath only bad debts, he may offer to assign them to the legatee, and shall be quit. 1 *Ought.* 370, 1.

If a man, by will, gives a lease, or a horse, or any specific legacy, and leaves a debt, by mortgage or bond, in which the heir is bound, the heir shall not compel the specific legatee to part with his legacy in case of the real estate; for though the creditor may subject this specific legacy to his debt, yet the specific or other legatee shall, in equity, stand in the place of the bond creditor or mortgagee, and take as much out of the real assets as such creditor, by bond or mortgage, shall have taken from his specific or other legacy. 1 *P. Will.* 730.

But if one owes debts, by bond or mortgage, and deviseth his lands to another in fee, and leaves a specific legacy, and dies, and the bond creditor or mortgagee comes upon the specific legacy for payment of his debt; the specific legatee shall not stand in the place of the bond creditor or mortgagee to charge the land: because the devisee of the land is as much a specific devisee as the legatee of a specific legacy; for it was as much the testator's intention that the devisee should have the land, as that the other should have the legacy; and a specific legacy is never broke in upon, in order to make good a pecuniary one. 3 *P. Will.* 324. 2 *Salk.* 416.

But if a man, indebted by mortgage, deviseth his lands to another in fee, (after payment of his debts and funeral charges) and also doth bequeath divers pecuniary legacies, and the personal estate is not sufficient to satisfy both the legacies and the mortgage; in such case, if the mortgagee shall not hold to the real, but shall fall upon the personal estate, the legatees shall stand in his room for so much out of the real estate as he shall take out of the personal; that being a proper fund for their payments. *Cas. Talb.* 53.

So, if a man give legacies to his daughters, charging his real estate with the payment thereof, and other legacies to his brother, without charging his real estate with the payment of these: if the daughters recover their legacies out of the personal estate, then the brother shall stand in the place of the daughters, and take so much out of the land for his legacy, as the daughters had exhausted out of the personal assets. 2 *P. Will.* (619)

11. Where there are divers executors, and some of them are dead, the legatary must sue the surviving executors, and not the executors or administrators of those that are dead. And if all the executors are dead, he must sue the executors or administrators of him that died last, and not the executors or administrators of the rest: and the reason is, because it is presumed, that the goods of the deceased, not administered by the other executors, remained with the surviving executor; or, if they did not, it was through his own default; because, when the other executors were dead, he might and ought to have proceeded against their executors or administrators for restitution of the goods not administered. 1 *Ought.* 364.

CHAP. XII. Concerning the Distribution of Intestates' Effects.

BY the * 22 and 23 C. 2. c. 10. s. 3. commonly called the statute of distribution, it is enacted as followeth: *All ordinaries, having power to commit administration of the goods of persons dying intestate, shall and may, and are enabled to proceed and call administrators to account for, and touching the goods of any person dying intestate; and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear, (after all debts, funerals, and just expences of every sort first allowed and deducted) amongst the wife and children, or childrens' children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks pro suo cuique jure, according to the laws in such cases, and the rules and limitations hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by the due course of his majesty's ecclesiastical laws: saving to every one supposing him or themselves aggrieved, their right of appeal, as was always in such cases used.* Pub. Acts, No. 331, p. 81.

Ordinaries having power to commit administration]. At common law, no person at all had a right to administer, but it was in the breast of the ordinary to grant it to whom he pleased, till the statute of the 21 H. 8. c. 5. † was made, which gave it to the next of kin; and if there were persons of equal kin, which ever took out administration was entitled to the surplus. And for this reason, this statute of the 22 and 23 C. 2.* was made, in order to prevent this injustice, and to oblige the administrator to distribute. 1 Atk. 459.

Of any person dying intestate]. T. 8 W. Petit and Smith. Prohibition was granted to the delegates, to stay a suit there, because they compelled an executor to make distribution of the surplus, he having £ 50. devised to him as a legacy; because, there being a will, and an executor, the spiritual court cannot compel distribution but only where the party dies intestate. L. Raym. 86.

And in the case of the King and Sir Richard Raines, M. 10 W. If an executor be sued in the ecclesiastical court to make distribution, he not being residuary legatee; though that were allowed by the canon law, yet the king's bench would grant a prohibition to stay any such suit; for all suits for distributions were prohibited by the king's bench, until the statute of the 22 and 23 C. 2. c. 10. made them lawful; and they are only lawful so far as is warranted by that statute, which is only in case of persons dying intestate. L. Raym. 363.

E. 3 G. 2. Hatton and Hatton. Strange moved for a prohibition to the prerogative court, in a suit there instituted by the next of kin against the executor; to make distribution of the surplus, there being a specific legacy to the executor, for that although there have been variety of decisions upon this point in courts of equity, where they have sometimes

* In force here.

† Not of force here.

times held the executor to be a trustee for the next of kin as to the surplus, yet there was no instance of the spiritual court's judging of a trust, or setting up any interest contrary to the common law. He insisted, that in the case of a will the judge below is *functus officio*, when he hath granted probate, as to all purposes but calling for an inventory according to the statute of the 21 H. 8. c. 5. And he cited the case of *Petit and Smith*, as reported in the 5 *Mod.* 247. where the testator gave £5. to the executor, and the daughter cited him to make distribution, and a prohibition was granted. And in a report of the same case in *Comb.* 378. it is said by Holt chief justice, they never pretended to distribution in the case of an executor; and they only do it in the case of an administrator by virtue of the statute; and he denied the notion in 2 *Inst.* 33. that executors must divide. Dr. Sayer, on the contrary, endeavoured to maintain, that the spiritual court had concurrent jurisdiction with the court of chancery in this case, as well as in legacies; and insisted that this is a partial intestacy, as to the surplus. But the court was clearly of opinion, that the spiritual court could not intermeddle; and said, that in case of an intestacy, they used to be prohibited, as in *Carter*, 125. 1 *Lev.* 233. and that the statute of distribution enlarged, and not barely confirmed their power, as appears by the history of that statute in *Raym.* 496, &c. And the rule for a prohibition was made absolute. And the court offered, that if the common lawyers on the doctor's side, who were *Reeve*, *Lee* and *Fazakerley*, would say that they thought there was any thing in it, the plaintiff should declare in prohibition; but they declined it. *Str.* 865.

To order and make just and equal distribution] *T. 10 W. Clerke and Clerke*: Clerke died intestate. His wife took out letters of administration to him. Clerke, brother to the intestate, cited the defendant into the spiritual court, to make distribution of the intestate's estate. The defendant there suggests, that the brother hath goods of the intestate in his hands to the value of £200. And upon this the spiritual court orders him to bring the £200. into court, to the end it may be distributed. And for not bringing it in they excommunicate him. Upon which he moves in the king's bench for a prohibition; and it was granted as to the whole process that compelled him to bring in the £200. For by the court; the spiritual court hath power to make distribution of the estate, when it is come in, but not to fetch it in; because that is to hold plea of debt: but the spiritual court might refuse in this case to proceed to the distribution, until the brother had brought in the £200. but they cannot excommunicate him for not bringing it in. *L. Raym.* 585.

Distribution] Where there is only one person that can take, the statute vests the right in that person; although, in such case, it is not strictly and literally a distribution. 3 *P. Will.* 50.

And all ordinaries, and other persons by this act enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates, in manner and form following; that is to say, one third part of the said surplusage to the wife of the intestate, and all the residue, by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent
such

such children, in case any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate, in his life time, by portion or portions equal to the share which shall, by such distribution, be allotted to the other children to whom such distribution is to be made: And in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate, in his life time, by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the life time of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated: But the heir at law, notwithstanding any land that he shall have, by descent or otherwise, from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath, by descent or otherwise, from the intestate. § 5.

And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate; the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them. § 6.

Provided, that there be no representation admitted among collaterals, after brothers' and sisters' children. § 7.

And in case there be no wife, then all the said estate to be distributed equally to and amongst the children. § 7.

And in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives, as aforesaid, and in no other manner whatsoever. § 7.

Provided also, and be it enacted, to the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death; and that such and every one to whom any distribution and share shall be allotted, shall give bond, with sufficient sureties, in the said courts, that if any debt or debts, truly owing by the intestate, shall be afterwards sued for and recovered, or otherwise duly made to appear, that then, and in every such case, he or she shall respectively refund and pay back to the administrator his or her rateable part of that debt or debts, and of the costs of suit, and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid. § 8.

Provided always, and be it enacted, that in all cases where the ordinary hath used heretofore to grant administration cum testamento annexo, he shall continue so to do; and the will of the deceased, in such testament expressed, shall be performed and observed, in such manner as it should have been if this act had never been made. § 9.

And by the * 29 C. 2. c. 3. s. 25. for explaining the said statute, it is declared, that nothing therein shall extend to the estates of feme-coverts that

* In force here.

that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act.

And by the * 1 J. 2. c. 17. If, after the death of a father, any of his children shall die intestate, without wife or children, in the life-time of the mother, every brother and sister, and the representatives of them, shall have an equal share with her; any thing in the said act to the contrary notwithstanding.

Before I enter fully into the consideration of the distribution of intestates' estates, it may be proper to contrast this statute with the act of assembly passed in the year 1789, by the legislature of this state; from whence we shall see, that this statute can now be of very little consequence as a guide to those in future who administer on the estates of intestates. The 1st member of the above recited section of the statute directs, *that one third part of the surplusage of the estate of an intestate shall go to the wife, and all the residue, by equal portions, to and amongst the children of such person dying intestate:* And the distribution between a wife and children, according to the said act of assembly, is exactly the same; for it recites—*If the intestate shall leave a widow, and one or more children, the widow shall take one third of the said estate, and the remainder shall be divided between the children, if more than one; but if only one, the remainder of the estate shall be vested in that one absolutely for ever.* § 1.

The statute goes on—*And such persons as legally represent such children, in case any the said children be then dead.* The act of assembly declares, that the lineal descendants of the intestate shall represent their respective parents, and be entitled to receive equally among them the shares to which their parents would respectively have been entitled had they survived the ancestor. The statute then makes an exception as to such child or children (not being heirs at law) who shall have any estate by the settlement of the intestate, or who shall be advanced by the intestate, in his life-time, by portion, or portions, equal to the share which shall, by such distribution, be allotted to the other children to whom such distribution is to be made. *And in case any child (other than the heir at law) who shall have any estate, by settlement, from the said intestate, or shall be advanced by the said intestate, in his life-time, by portion not equal to the share which shall be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the life-time of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated.*

Our act of assembly concurs generally with this idea, that whatever has been received by a child in the life of the parent, as an advancement, shall be thrown into hotchpot; for it enacts, *that nothing contained in the act shall be construed to give to any child or issue (or his or her legal representatives) of the intestate, a share of his or her ancestor's estate, where such child or issue shall have been advanced, by the intestate,*

in

* In force here.

in his life-time, by portion, or portions, equal to the share which shall be allotted to the other children; but in case any child, or the issue of any child, who shall have been so advanced, shall not have received a portion equal to the share which will be due to the other children, (the value of which portion being estimated at the death of the ancestor, but so as neither the improvements of the real estate by such child or children, nor the increase of the personal property, shall be taken into computation) then so much of the estate of the intestate shall be distributed to such child or issue as shall make the estate of all the children to be equal. § 14.

The statute then declares, that the heir at law, notwithstanding any land that he shall have by descent, or otherwise, from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise, from the intestate. But our act more impartially, and more humanely destroys the right of the elder brother, or heir at law, to take all the lands of the intestate, and directs that they also, as is above-mentioned, should be brought into hotchpot, and subject to distribution, as well as the personal property. It enacts, that the rights of primogeniture is abolished, and that when any person possessed of, interested in, or entitled to a real estate in his or her own right, in fee simple, shall die without disposing thereof by will, the same shall be distributed. § 1. And in another clause it is enacted, that, in all cases of intestacy, the personal estate of the intestate shall be distributed in the same manner as real estates are disposed of by this act. § 13.

And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them. § 6. This not being thought sufficiently plain and explicit, the act of assembly asserts, that if the intestate shall not leave a child, or other lineal descendant, but shall leave a widow, and a father or mother, the widow shall be entitled to one moiety of the estate, and the father, or, if he be dead, the mother, shall be entitled to the other moiety. § 4. And again, if the intestate shall not leave a lineal descendant, father or mother, but shall leave a widow and brothers and sisters, or brother or sister of the whole blood, the widow shall be entitled to one moiety of the estate, and the brothers and sisters, or brother or sister, to the other moiety, as tenants in common. The children of a deceased brother or sister shall take among them respectively the share which their respective ancestors would have been entitled to had they survived the intestate. § 5.

Provided, that there be no representative admitted among collaterals after brothers and sisters' children. § 7. The act of assembly being perfectly silent on this head, in cases of this sort, we must resort to the statute.

The statute further provides, that in case there be no wife, then all the said estate shall be distributed equally to and amongst the children; and in case there be no child, [and no widow the statute means] then the said estate of the intestate shall go to the next of kindred in equal degree of, or unto the intestate, and their legal representatives, as aforesaid, and in no other manner whatsoever. With which the act concurs, declaring, that

that if the intestate shall leave no widow, the provision made for her shall go as the rest of his estate is directed to be distributed in the respective clauses in which the widow is provided for. § 9.

It having been understood, under the above statute, by the bar in Westminster-hall, that a husband was compellable to make distribution of the personal estate of his wife, the 29 C. 2. c. 3. was passed, explaining the statute of distributions, and declaring, that nothing therein contained shall extend to the estates of feme-coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act. Our act of assembly, not mentioning this subject, leaves the statute still operating in full force; but, under the act, the husband acquires a proportional part of her real property, which he was not entitled to before; for it enacts, that, on the death of any married woman, the husband shall be entitled to the same share of her real estate, as is herein given to the widow out of the estate of the husband. § 11.

The 1 J. 2. c. 17. has further declared how the distribution of an intestate's effects shall be made in case of his having only a mother and brothers and sisters alive, by enacting, that if, after the death of a father, any of his children shall die intestate, without wife or children, in the life-time of the mother, every brother and sister, and the representatives of them, shall have an equal share with her, any thing in the said act to the contrary notwithstanding. This is a case which frequently happens, but which has been altered by our act of assembly; wherein it is to be observed, that if the intestate should die without a wife, child, or father, the mother would take the whole in exclusion of brothers and sisters.

These three statutes are those under which the personal property of intestates are distributed in England, which, with the various adjudications thereon, form their distributive code; to which we have added our act of assembly, which does not make any of the points clearer, which it has adopted in common with those statutes, but works a very great alteration in the several proportions of the distributive qualities. I will therefore recite the remaining part of the act, as far as relates to distribution, and then point out the liberal emendations which it has occasioned in this part of our law.

§ 6. If the intestate shall leave no lineal descendant, father, mother, brother or sister of the whole blood, but shall leave a widow; and a brother or sister of the half blood, and a child or children of a brother or sister of the whole blood, the widow shall take one moiety of the estate, and the other moiety of the estate shall be equally divided between the brothers and sisters of the half blood, and the children of the brothers and sisters of the whole blood; the children of every deceased brother or sister of the whole blood taking, among them, a share, equal to the share of a brother or sister of the half blood. But if there be no brother or sister of the half blood, then a moiety of the estate shall descend to the child or children of the deceased brother or sister; and if there be no child of a deceased brother or sister of the whole blood, then the said moiety shall descend to the brothers and sisters of the half blood.

§ 7. If the intestate shall leave no lineal descendant, father, mother, brother

or

or sister of the whole blood, or their children, or brother or sister of the half blood, then the widow shall take one moiety, and the lineal ancestor or ancestors, if any there be, the other moiety.

§ 8. If the intestate shall leave no lineal descendant, father, mother, brother or sister of the whole blood, or their children, or brother or sister of the half blood, or lineal ancestor, then the widow shall take two thirds of the estate, and the remainder shall descend to the next of kin.

§ 11. On the death of any married woman, the husband shall be entitled to the same share of her real estate as is herein given to the widow out of the estate of the husband; and the remainder of her real estate shall be distributed among her descendants and relations, in the same manner as is heretofore directed in the case of the intestacy of a married man.

§ 12. If the intestate shall leave no husband, the provision herein made for him shall go as the rest of the estate is directed to be distributed in the preceding clauses.

§ 13. In all cases of intestacy, the personal estate of the intestate shall be distributed in the same manner as real estates are disposed of by this act.

In perusing these statutes, and the acts, we discover at once the bold and liberal impartiality of a free people; doing equal justice to all their children, male and female. The abolition of the rights of primogeniture is one of the first and most essential steps in a republic, to make men have a proper idea of their natural equality, and of the impartial justice that ought to be administered to the same members of the same community. That people who have been and continue to be accustomed to consider their eldest son as entitled to rights superior to their other children, can easily be led to believe, that the interests of the whole community may, with equal justice, and the same hallowed propriety, be consecrated and sacrificed to one individual.

The second observation that naturally follows the above consideration is, that real property is sunk down and reduced to the level of that of personal: and this appears to be the just consequence of the former; for it would have been in vain to have annihilated the rights of primogeniture, and not to have directed the distribution of the real estate upon the same terms and in the same manner as that of the personal.

A third reflection which suggests itself, and is a corollary deducible from the first proposition, is, where the elder son, or any other child, has been advanced, in the life-time of the father, in a certain quantity of land, that the same shall be brought into hotchpot; but that the improvements made to such land, by such child so advanced, shall not be taken into the computation.

In the 4th place we discover, that a certain part of the wife's real estate, in the whole of which the husband was entitled only to a life estate formerly, is vested absolutely in the husband, to the deterioration of her descendants and relations: but surely it is just and equitable, that the husband, who perhaps received no other dowry with her than this land, and who has consequently borne all the expence of her maintenance, and who probably has improved the said land very considerably, should derive some advantage for the expence and trouble which he has incurred by marrying and putting the land in order, for perhaps distant relations. It is also to be adverted to, that this is only putting the husband

band precisely in the same situation which the wife enjoys by this act; so that there is now a reciprocal advantage to be expected by each.

The fifth material alteration which this act produces, is the distribution of real estates, between brothers' and sisters' children of the whole blood, and brothers and sisters of the half blood. By the law of England, the line of the half blood did not possess an inheritable quality, but that had been remedied by the escheat law which passed in the year 1787, but postponed such person of the half blood, until there was a total defect of the whole blood: the present act having, however, razed the barrier of distinction between real and personal estate, and reduced them to one common level, without discrimination, as to the distributable qualities of each, it was natural and just to put persons of the half blood upon a better footing than they had hitherto been, and to consider them, in the eye of the law, as well as in that of reason, as entitled to some part of that estate of which their mutual parent was in possession.

There is, sixth, another very great improvement on the old law, and which is extremely advantageous to the widow of a deceased intestate, where he leaves no lineal descendant, or ascendant, or brother, or sister, of the whole blood, or their children, or brother or sister of the half blood; then, and in such case, the widow shall take two thirds of the estate, and the remainder shall descend to the next of kin.

The seventh variation which has been introduced is, that lands are made ascendable in the right line, which is directly contrary to the principle which, prevailing here, had been adopted by the British canon, that land shall rather escheat to the lord than ascend to the grandfather: but this is only restoring the old law, which prevailed in the time of Hen. 1st. for under his reign the right of succession in the ascending line was restored, though it immediately afterwards fell into disuse again under Hen. 2d. for Glanville tells us, *hæreditas nunquam ascendit*; and this has remained an invariable maxim in England ever since.

Eighthly, after having adopted the sentiments of equality expressed in the above recited emendations, we are not surprised to find, that the old method of computing the degrees of kindred should be violated, and the one adopted by the civil law introduced among us. The act enacts, § 10. *that in reckoning the degrees of kindred, the computation shall begin with the intestate, and be continued up to the common ancestor, and thence down to the person claiming kindred inclusively, each step being reckoned as one degree.* And this is the mode adopted by the Roman law, where no inconvenience at all can result from their many claimants, and in the same degree of kindred, as uncles and nephews of the deceased: for the Roman law having rendered the inheritances partible between those of equal degree, they will each have a certain equal portion, which precludes all idea of confusion resulting from such a division of the property. But the very reverse would be the case with the law of England, where only one person can be called to the inheritance: but with us, the nephew is preferred to the uncle.

Neither can it, ninthly, escape our observation, that the unjust preference hitherto given to the males before females, is totally discountenanced and abolished; for each and every female will be impartially

entitled to an equal distributive share, both of the personal and the real estate of their intestate parent. In the same manner we cannot but take notice of the equality introduced between the males where there are only brothers; for, instead of the elder inheriting the whole of the landed estate, the act divides it into as many equal partitions as there are brothers. Likewise, we observe the same principle to be extended to the more distant collateral inheritors.

The fifth canon of descents, which Blackstone lays down, is, that, on failure of lineal descendants, or issue, of the person last seized, the inheritance shall descend to the blood of the first purchaser, subject to the three preceding rules he has laid down: but we find, in case that there is no lineal descendants, the estate shall go to the ascendants, and those of the collaterals and half blood, who are mentioned in the act; and in case of defect of all these, then to the next of kin.

This I take to be a total repeal of the principle laid down in Blackstone, as mentioned above, which indeed is peculiar to the English and Roman laws of descent, both of which are of feodal origin, and which probably is the reason of their agreeing. But it was intirely unknown among the Jews, Greeks, and Romans, whose laws looked no farther than to the person himself who died seized of the estate, and which assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. So that the great and general principle upon which the law of collateral inheritances depend in England, and which had heretofore been in use here, viz. that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser, or that it shall result back to the heirs of the body of that ancestor from whom it really has, or is supposed, by fiction of law, to have originally descended, is altogether abolished.

I will now proceed to state the several decisions which have been had in the courts of Great-Britain, and then shew which are applicable, and which not, to the present state of our law.

The residue—to and amongst the children] An infant *in ventre sa mere*, at the time of the death of the father, was held clearly, by the lord chancellor, to be entitled to a share by the statute of distribution; for he is, in the eye of the law, a child, and ought to be provided for as well as the rest. *M. 1698. Ball and Smith. 2 Freem. 230.*

Who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his life-time] It hath been determined, that small, inconsiderable sums, occasionally given to a child, cannot be deemed an advancement or part thereof. Thus maintenance money, or allowance made by the father to his son at the university, or in travelling, or the like, is not to be taken as any part of his advancement; this being only his education: and it would create charge and uncertainty, to inquire minutely into such matters. So, putting out a child apprentice is no part of his advancement; for it is only procuring the master to keep him for seven years instead of the parent. *Hender and Rosa, at the Rolls, T. 1718.* But the father's buying an office for the son, though but at will, as a gentleman pensioner's place, or a commission in the army, these are advancements pro tanto. *Norton and Norton, M.*

1792. By the lords commissioners. *Rawlinson and Hutchins.* 3 P.
Will. 317.

Also, a provision made by a *marriage settlement*, although it is in the nature of a purchase, yet is such an advancement, as that a child claiming a distributive share shall first bring the said advancement into hotchpot. As in the case of *Phyney and Phyney*, H. 1708. The father, on his son's marriage, covenanted, in case of a second marriage, to pay to the first son by the first wife £500. There was a son, and several other children of the first marriage. The father of these children died intestate. By the court: the heir must bring the £500. into hotchpot, although in nature of a purchaser under a marriage settlement. 2 *Vern.* 638.

So, in the case of *Edwards and Freeman*, M. 1727. Before King lord chancellor, assisted by Raymond chief justice, and the master of the rolls, and Price and Fortescue justices. Mr. Freeman, on his marriage, entered into articles, in consideration of the said marriage, and of £4000. portion, to settle an estate to raise portions for daughters, in case there were no sons; that is to say, if but one daughter the sum of £5000. if two or more, then the sum of £6000. equally amongst them, to be paid at their respective ages of 18 years, or days of marriage, which should first happen; and £80. a year maintenance in the mean time to each daughter. The marriage took effect; and they had issue one daughter only, and no son. Then the wife dies. Afterwards Mr. Freeman married a second wife; and had by her a son and a daughter; and died intestate, leaving a personal estate to the amount of £20,000. The daughter by his first wife, at that time, was about 12 years of age; and some time after, married the plaintiff, Mr. Edwards: and they brought their bill, to have an account of the personal estate of Mr. Freeman, and their distributory share thereof. And the only question was, whether this £5000. should not be looked upon to be so far an advancement of the plaintiff, the wife of Mr. Edwards, that if she would have any farther share of her father's personal estate, they must bring this £5000. into hotchpot.—For the plaintiffs it was argued, that they were entitled to a distributory share, without regard to this £5000. which was no advancement, either within the words or meaning of the act, which intended only an advancement of children after they are in being, and when they are about being married or disposed of in the world; but this, if any, was an advancement long before the plaintiff was born, and when it was wholly unknown and uncertain whether there ever would be such a daughter: that it was likewise contingent and uncertain, after she was born, whether she would ever be entitled to this fortune or not; for if she had died before 18, or marriage, it would have sunk into the inheritance, for the benefit of the heir; and she was but 12 years of age at the time of her father's death, and therefore might have died before she was entitled to this £5000. that the statute must operate, either at the time of the father's death, or within a year after at furthest; but, in this case, the plaintiff was not entitled to her £5000. either in her father's lifetime, or within a year after; and the distribution was not to wait till it should appear whether she would attain 18, or be married: that this
£5000.

£ 5000. was not a voluntary provision moving from the father; but the plaintiff was a purchaser thereof, in consideration of her mother's portion; and suppose a child had money of his own, and agreed with his father, in consideration thereof, to have a portion from his father, after his death; or if a collateral relation had purchased such a portion from the father for his child, certainly this would not be an advancement; and the intent of the statute was, to make them all equal out of the father's personal estate, not out of what was purchased for them by others, or by the mother, as in this case.—On the other side, it was argued for the defendants, that the £ 5000. thus provided for by the settlement, was an advancement within the meaning of the statute; which appears throughout to intend and preserve an equality between the children: that the statute makes no distinction, whether it was a voluntary provision of the father, or arose from the contract of the parties; and a child provided for either way, is provided for; and it is not like the cases put, where a child, either with his own or a relation's money, purchases an estate, or a sum of money from the father, but a direct sale, as much as it would have been to any stranger: that this portion, though not payable till after the father's death, was, nevertheless, a provision for her by him, in his life-time, as the act speaks; as the principal part of it, to wit, the security, was executed by him, in his life-time; and as he was not at liberty to controul it; and suppose he had given such a portion payable at his death, this would certainly have been a good provision within the statute; and here the portion is payable as soon as possibly it can be wanted, namely, at 18, or marriage, and a maintenance of £ 80. a year in the mean time; and though it is true, that a portion out of lands sinks in the inheritance, if the party dies before it becomes payable, which, if it were a personal estate, it would not, yet that is not material here, since the statute makes no distinction whether the portion is payable out of the real or personal estate: that if a bill had been brought immediately after the father's death for a distribution, there could be no inconvenience in setting apart a sum to answer the contingency, when it should happen, no more than in the case of debts, which is every day done; and there are some whose estates are not got in till several years after their deaths; and a distribution may very properly be made thereof from time to time, as they come in. And the court were all clear of opinion, that this was an advancement by the father in his life-time, within the meaning of the statute, though contingent and future, so that she could not have that and her distributory share likewise. And the master of the rolls said, that the civil law made no difference between a real and personal estate, but only moveable and immoveable; and the words of the act, which speak of a provision made by the father in his life-time, are very proper to distinguish between that and a provision made by his will. And the chief justice said, suppose the father had left but £ 2000. personal estate, it would be extremely hard that the eldest daughter should have her £ 5000. and a share of the £ 2000. also. And the lord chancellor said, he thought any settlement in or out of lands, either by annuity, rent, or portion, would be a provision within the statute; and that such provision might be valued and brought into the

the collatio bonorum, if they think it worth their while; that the £5000. whether called contingent or not, is an interest, and such a one as would happen within a reasonable time, to wit, six or seven years after the father's death; that the distribution must be made as the estate stands at the father's death, and the parties are to give bond to refund, if debts afterwards appear; and future debts due to the intestate must be distributed as they can be got in; that here the contingency has happened, and she is now at liberty to say, whether she will stick to that provision, or bring it into the computation of collatio bonorum, in order to have an equal share with the rest. But as to the £80. a year maintenance, that is not to be brought in, being only for the education and maintenance of the daughter, which the parents were best judges of.—And accordingly the decree was pronounced. 1 *Abr. Eq. Cas.* 249.

So, in the case of *Lloyd and Twitsham*, *H.* 1715; the lord chancellor Cowper was of opinion, that the word *portion* in the statute, with respect to younger children, includes an estate in *land* as well as in money; and that this land, in the computation of the estate to be distributed, is to be added to, and computed with the other parts of it: but with respect to the eldest son, whatever land came to him from his father, by descent, or otherwise, he is to have his share, without any consideration of the value of such land. *Viner. Executors.* [Z. 10.] 3.

So, if the father settles a *rent* out of his lands upon a younger child; this is an advancement. 2 *P. Will.* 441.

Likewise, if the father, by deed, settles an *annuity* upon a child, to commence after his death; this is an advancement pro tanto: and, by the same reason, a *reversion*, settled on a child, as it may be valued, is an advancement also. 2 *P. Will.* 442.

But whatever a child receives out of the *mother's* estate, it is said, shall not be brought into hotchpot. As in the case of *Holt and Frederick*, *T.* 1726. A man married, and had three children, two sons and a daughter. His wife survived him; and having, out of her own estate, given £1000. to her daughter in marriage, died intestate, leaving those three children. The question was, whether the daughter, who had received this £1000. ought to bring it into hotchpot, before she should receive any further share of her mother's personal estate. The lord chancellor King said, it weighed with him, that the act of distribution was grounded upon the custom of London, which never affected a *widow's* personal estate; and that the act seems to include those within the clause of hotchpot, who are capable of having a wife as well as children, which must be husband's only. And so, in this case, (though without much debate) his lordship ruled, that the daughter should not bring the £1000. which she had received in her mother's life-time, into hotchpot. 2 *P. Will.* 356.

The principle of advancement is very clearly laid down in the 14 § of the *Pub. Acts*, No. 1602, where it is declared, that nothing therein contained shall be construed to give any child or issue, (or his or her legal representatives) of the intestate, a share of his or her ancestor's estate, where such child shall have been advanced by the intestate, in his life-time, by portions equal to that of the other children. But, in case

case any child, or issue of any child, who shall have been so advanced, shall not have received a portion equal to the share which will be due to the other children, (the value of which portion being estimated at the death of the ancestor, but so as that neither the improvements of the real estate by each child, nor the increase of the personal property, shall be taken into computation) then so much of the estate of the intestate shall be distributed to such child or issue, as shall make the estate of all the children to be equal. By which we also observe, that any advancement to a child out of the mother's estate, is thereby also directed to be brought into hotchpot.

And if a child, who has received any advancement from his father, shall die in his father's life-time, leaving children, such children shall not be admitted to their father's distributive share, without bringing their father's advancement into hotchpot: as in the case of *Proud and Turner, M. 1729.* A father had several children, and in his life-time advanced in part one of them. The child thus advanced in part, died in his father's life-time, leaving issue. Afterwards the father died intestate, possessed of a considerable personal estate. It was ruled, that the issue of the dead child must bring into hotchpot what their father received in part of advancement, as he, if living, must have done; in regard the issue stands in the place and stead of the father, claims under him, and cannot be in a better condition than the father, if living, would have been, and had claimed his distributive share. *2 P. Will. 560.*

And the reason is, because such children do not take in their own right, but as representing their father deceased. And this doctrine is confirmed by the last recited clause of our act of assembly.

And so extremely jealous are we in this state, of the just and equal rights of children, that our acts directs, that if any child should die in the life-time of the father or mother, leaving issue, any legacy given in the last will of such father or mother, shall go to such issue, unless such deceased child was equally portioned with the other children by the father or mother when living. *Pub. Acts, No. 1582, § 9.*

But whether those grand-children, having been advanced, some more, some less, by their father, in his life-time, shall bring their several advancements into hotchpot one with the other, before they shall distribute their deceased father's share of their grand-father's personal estate, doth not appear to have been determined. If their father also died intestate, then it seemeth, that they shall be required to bring in hotchpot; for, in such case, they take, not from their grand-father, but from their father: and this brings it within the general rule aforegoing.

But where there are only grand-children, their fathers or mothers respectively having died in the life-time of their grand-father; in such case they take in their own right, and not by representation of their father or mother deceased. Whether these also shall bring into hotchpot, either altogether, or those descended from the same stock amongst themselves respectively, may, upon the like grounds, be matter of doubt. But it seemeth that this case is farther off from the rule than the former: for here they do not take by representation, but each in his own right. And the statute doth not seem to require that the col-
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latio bonorum shall extend further than to children, or the *representatives* of such children.

A doubt likewise may arise, and the solution thereof will be the same, where a grand child hath received some advancement, not from his father, but from his grand-father, whether or no such grand-child shall bring his said advancement into hotchpot with the brothers and sisters of his father deceased. The grand-child, in this case, taketh not in his own right, but as representative of his father; and therefore, as it seemeth, should not bring his own portion, but only his father's portion, into hotchpot. But concerning these points no adjudication hath occurred.

By portion not equal to the share which would be due to the other children. A child partly advanced shall bring in its advancement only amongst the other children; but the wife shall have no advantage of it. *H. 1701. Ward and Lant. Prec. Cha. 182, 184.*

To every of the next of kindred to the intestate who are in equal degree. Here it is very material to inquire, who are these *next of kindred in equal degree*. For the perfect understanding whereof, it is to be observed, that kindred are distinguished either by the *right line*, or by the *collateral*: the *right line* is of parents and children, computing by *ascendants* and *descendants*: the *collateral line* is between brothers and sisters, and the rest of the kindred among themselves. *Ayl. Par. 327.*

And forasmuch as proximity between two persons proceeds either from this, that they are descended one from the other (which makes the connexion between ascendants and descendants,) or from their being both descended of one and the same person (which makes that of collaterals;) we judge therefore of the proximity between two persons, by the number of generations which make both the one and the other of the said connexions. And these generations are called *degrees*, by which we step from one person to another, in order to make the computation of their kindred, in the manner hereafter explained. *1 Stra. Dom. 631.*

Those of the *right line* are reckoned upwards, as parents; or downwards, as children; those of the *collateral line* are reckoned *ex transverso*, or side-ways, as brothers and sisters, uncles and aunts, and such as are born from them. *Ayl. Par. 327.*

And there is no difference between the *civil* and *canon* law in the ascending and descending line; but every generation, whether ascending or descending, constitutes a different degree: thus the father of John is related to him in the first degree, and so likewise is his son; his grand-father and grand-son in the second; his great-grand-father and great-grand-son in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the *civil* and *canon*, as in the *common law*. *Blackst. Descents. 8.*

But there is a difference in reckoning the *collateral line*. Thus, if we would know in what degree of collateral kindred two persons stand according to the *civil law*, we must begin our reckoning from the one of them, by ascending to the person from whom both are branched, and then, by descending to the other to whom we do count, and it will appear in what degree they are: For example, in brothers and sisters
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sons; take one of them, and ascend to his father, there is one degree; from the father to the grand-father, that is the second degree; then descend from the grand-father to his son, that is the third degree; then from his son to his son, that is the fourth degree. 1 *Inst.* 23.

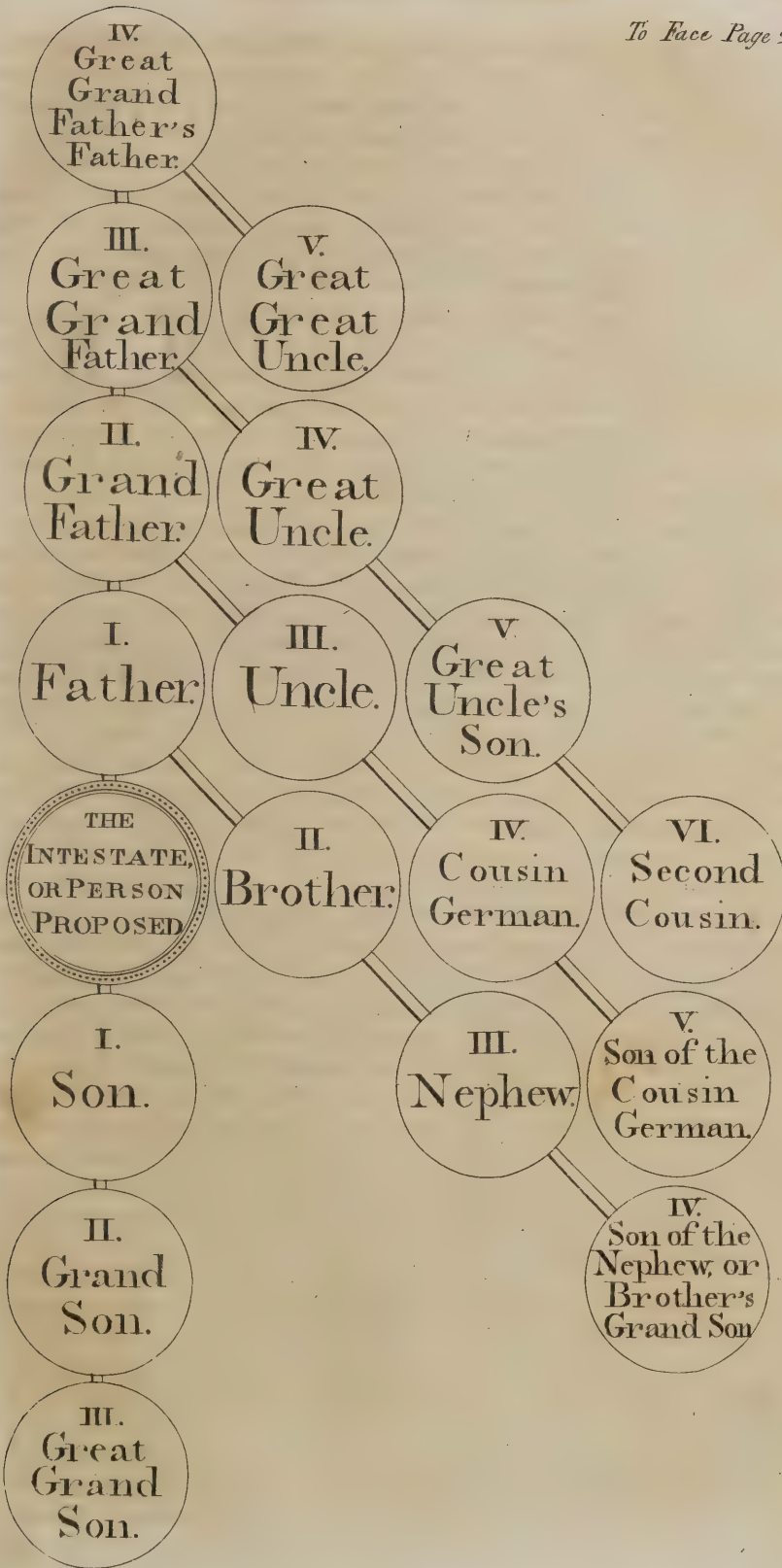
And this is the method now adopted in this state; for the act recites, that *in reckoning the degrees of kindred, the computation shall begin with the intestate, and be continued up to the common ancestor, and thence down to the person claiming kindred inclusively, each step being reckoned as one degree.* § 10, No. 1602, *Pub. Acts.*

But by the *canon law*, (which the English law has adopted; and which was the method followed in this state before the above recited act was passed) there is another computation. For the canonists do ever begin from the stock; namely, from the person of whom they do descend, of whose distance the question is: For example, if the question be, in what degree the sons of two brothers stand by the canon law, we must begin from the grand-father, and descend to one son, that is one degree; then descend to his son, that is another degree; then descend again from the grand-father to his other son, that is one degree; then descend to his son, that is a second degree. So, in what degree either of them are distant from the common stock, in the same degree they are distant between themselves. And if they be not equally distant, then we must observe another rule, viz. in what degree the most remote is distant from the common stock, in the same degree they are distant between themselves; and so the most remote makes the degree. 1 *Inst.* 24.

Collateral kinsmen agree with the lineal in this, that they descend from the same stock or ancestor; but they differ in this, that they do not descend from each other. Collateral kinsmen, then, are such as lineally spring from one and the same ancestor, who is the *stirps*, root, or common stock, from whence these relations are branched out. As if John has two sons, who have each a numerous issue; both these issues are lineally descended from John as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguinei*. *Blackst. Desc.* 9, 10.

And the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus John and his brother are related; why? because both are derived from one father: John and his first cousin are related; why? because both descend from the same grand-father: And his second-cousin's claim to consanguinity is this; that they both are derived from one and the same great-grand-father. In short, as many ancestors as a man hath, so many common stocks he hath, from which collateral kinsmen may be derived. *Id.* 10, 11.

The manner of calculating the degrees may perhaps be better apprehended by the following table: Wherein it is to be observed, that the letters at the top, express the degrees by the *civil law*; and which we are now obliged to follow under the last mentioned act of assembly.





And here it is evident, that the degrees in the *descending* and *ascending* lines are the same. Thus the son is in the first degree, the grand-son in the second, and the great-grand-son in the third, in the *descending* line. So the father is in the first degree, the grand-father in the second, and the great-grand-father in the third, and so on, in the *ascending* line.

But in the *collateral* line the calculation is different; for the cousin-german is in the fourth degree. For, by the civil law, we ascend first to the father, which is one degree; from him to the common ancestor, the grand-father, which is the second degree; from the grand-father we descend to the uncle, which is the third degree; and from the uncle to the cousin-german, which is the fourth degree. So, in reckoning to the son of the nephew, or brother's grand-son: By the civil law, we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which is the third degree; and from the nephew to the son of the nephew, which is the fourth degree.

The reason of the different methods of computing the degrees of consanguinity in the collateral line, between the civil law on the one hand, and the canon law on the other, seemeth to be this: The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed; it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him, and makes not only the son of his nephew, but also his cousin-german, to be both related to him in the fourth degree, because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him: so that the son of the nephew is related in the third canonical degree to the person proposed, and the cousin-german in the second; the former being distant three degrees from the common ancestor, and therefore deriving only one fourth of his blood from the same fountain with the person proposed; the latter, and also the person proposed, being each of them distant only two degrees from the common ancestor, and therefore having one half of each of their bloods the same. *Blackst. Desc.* 41, 42.

For, persons descended from one common ancestor, in the first degree, have the whole blood of their said common ancestor; in the second degree, they have but half the blood of the said common ancestor; in the third degree, they have but half of that half, that is, one fourth; in the fourth degree, only half of that fourth, that is, one eighth; in the fifth degree, one sixteenth; and so on in infinitum.

The common law regards consanguinity principally with respect to descents; and having therein the same object in view as the civil, it may seem as if it ought to proceed according to the civil computation. But as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore

counts its degrees in the same manner. Indeed, the designation of person, in seeking for the *next of kin*, will come to exactly the same end (though the degrees will be differently numbered) which ever method of computation we suppose the law of England to use; since the right of representation in the descent of real estates (of the father by the son, and so on) is allowed to prevail in infinitum. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degrees of kindred, as (for instance) uncles and nephews of the deceased; which multiplicity, though no inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion, where the right of sole succession, as with us, is established. The issue or descendants therefore of the brother of John, are all of them in the first degree of kindred, with respect to inheritances, as their father when living was; those of his uncle in the second, and so on; and are called to the succession in right of such their representative proximity.

The right of representation being thus established, the rule with regard to the descent of real estates amounts to this; that, on failure of issue of the person last seized, the inheritance shall descend to the issue of his next immediate ancestor. Thus, if John dies without issue, his estate shall descend to his brother, who is lineally descended from his next immediate ancestor, their father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John, the lineal descendant of their common ancestor, the grand-father; and so on. *Black. Ibid.*

But this representation, in infinitum, amongst collaterals, is not admitted in the succession to personal estate, the same being restrained and limited by the statute, (as will appear afterwards.)

In the case of *Wingate and Fitch*, *M. 21 Ja.* Administration upon the statute of Hen. 8. was granted to the brother of the half blood. The brother of the whole blood appealed to the delegates, alledging, that he was nearer of kin by the ecclesiastical law; and the delegates inclining to repeal the administration, and to grant it to the brother of the whole blood, a prohibition was granted to try the matter thereupon by the common law: for this being ordained by statute, it was said, that it ought to be interpreted according to the common law. *2 Roll's Abr. 303.*

And in the case of *Blackborough and Davis*, *E. 13 W.* Holt chief justice said, that the construction of the statute of distribution, on the proximity of degrees, must be according to the common law. *12 Mod. 616.*

But the more modern cases seem to suppose, that the said statute, being made in an ecclesiastical matter, shall be construed according to the rules of the civil law. And I suppose, that as we have adopted the principle of descents laid down in the civil law, that the calculation of proximity of degrees must, in future, be made according to the construction of the civilians.

Upon which account the learned Dr. Harris observes, that the three first chapters of the 118th Novel of Justinian deserve the reader's attentive consideration; not only because they contain the latest policy

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of the civil law, in regard to the disposition of intestates' estates, but because they are the foundation of our statute law in this respect.* And they are still (he says) almost of continual use, by being the general guide of the courts in England, which hold cognizance of distributions, in all those cases concerning which our own laws have been either silent, or not sufficiently express. *Harr. Justin. ad finem.*

And therefore it is adjudged requisite to insert the said three chapters here at length, and in the progress, to observe what alterations have been made by the statute aforesaid, and by the other laws of this realm, and how far the said Novel, with respect to this matter, seemeth to be still a rule and direction.

CHAPTER I. *Of the Succession of Descendants.*

"IF a person dieth intestate, leaving a descendant of either sex, or of whatsoever degree; such descendant is to be preferred to all ascendants and collaterals. And if any of the descendants of the deceased should die, leaving sons, or daughters, or other descendants, they shall succeed in the place of their parent, and shall be entitled to the same share of the intestate's estate, which their parent would have had if such parent had lived. And this kind of succession is termed a succession *in stirpes*; for, in the succession of descendants, we allow no priority of degree, but admit the grand-children of any person, by a deceased son or daughter, to be called to inherit that person, together with his sons or daughters, without making any distinction between males and females, or the descendants of males and females."

And what the civil law distributes in this manner amongst the children and other descendants, the statute clearly enough apportioneth amongst them, taking in together with them the wife of the deceased, where there is a wife surviving. And herein the civil, canon, common, and statute laws do all agree, in giving this preference to descendants, exclusive of all ascendants and collaterals.

Only with respect to *grand-children*, these by the civil law, even when alone, although they descend from various stocks, and are unequal in their numbers, will take the estate of their deceased grand-father *per stirpes*, and not *per capita*: as suppose a man should die, leaving grand-children by three different sons, already dead, to wit, three by one son, six by another, and twelve by another; each of these classes of grand-children would take a third of the estate, without any regard to the inequality of the numbers in each class. But as to this point, in England, the courts in which distributions are cognizable, will order the division of an estate in such case to be made *per capita*; and this, partly from a motive of equity, and partly from a consideration of the intent of the statute, which directs an equal and just distribution: and when the act mentions representation, it must be understood to refer to it in those cases only where representation is necessary to prevent exclusion, but

* Vide Holt's Cases, p. 259. Peere Williams's Rep. p. 27. Prec. in Chan. p. 593. and Raymond's Rep. p. 496.

but not to refer to it in those cases where all the claimants are in equal degree, and therefore can take each in his own right. *Harr. Just. ibid.*

Here we observe, that the language made use of in the act of assembly is such as is laid down by the civil law; for it enacts, that the lineal descendants of the intestate shall represent their respective parents, and be entitled to receive and divide, equally among them, the shares to which their parents would respectively have been entitled, had they survived the ancestor. § 3. No. 1602, *Pub. Acts.*

And if, in the case of the succession of a father, who leaves behind him one or more children, his widow should happen to be big with child, the child in the mother's womb would be reckoned among the children of the deceased. And if the other children should proceed to a partition of the estate, it would be necessary to lay aside one share for the child that is to be born, and to name a curator to it, who may take care of its interest; unless they should think it more convenient to delay the partition until the birth of the child, either by reason of the uncertainty whether the child will be born alive or not, or because it may happen that there may be more children than one of this birth.

¹ *Strah. Dom.* 624.

But this provision is rendered more effectual by the statute aforesaid, which requires that no distribution shall be made till after the expiration of one year from the intestate's death, within which time such child or children will be born.

CHAPTER II. *Of the Succession of Ascendants.*

“WHEN the deceased leaves no descendants, if a father or mother, or other ascendant survive him, we decree, that they shall be preferred to all collateral relations; except brothers or sisters, as shall be hereafter more particularly declared. And if divers ascendants are living, we prefer those who are in the nearest degree, whether they are male or female; paternal or maternal. And when several ascendants concur in the same degree, the inheritance of the deceased must be so divided, that the ascendants, on the part of the father, may receive one half, and the ascendants, on the part of the mother, the other half, without regard to the number of persons on either side. But, if the deceased leaves brothers or sisters of the whole blood, together with ascendants, these collaterals of the deceased shall be called with the nearest ascendants; and, although the surviving parents are a father and mother, the inheritance must be so divided according to the number of persons, that each of the ascendants, and each of the brothers and sisters, may have an equal portion.”

If a father or mother] By the law of England, when a child dieth intestate, leaving a father, the father is solely entitled to the whole personal estate of the intestate, exclusive of all others; and anciently, that is, in the reign of king Henry the first, a surviving father, or mother, could have taken even the real estate of their deceased child. But this law of succession was altered soon afterwards; for we find by Glanville, that in the time of king Henry the second, a father or mother could

could not have taken the real estate of their deceased children, the inheritance being then carried over to the collateral line. And it hath ever since been held, as an inviolable maxim, that an inheritance cannot ascend. But this alteration in the law, made since the reign of king Henry the first, did not extend to personal estate; so that before the statute of the *1 *Ja. 2. c. 17.* if a child had died intestate, without a wife, child, or father, the mother would have been entitled to the whole personal estate; but, by that statute, every brother and sister, and their representatives, shall have an equal share with her. *Harr. Just. ibid.*

And this statute, we may observe, is totally repealed, and rendered null and void by the 9th § of the act of assembly, No. 1602, which directs, *in case there is no widow, that the provision made for her shall go as the rest of the intestate's estate is directed to be distributed in the respective clauses in which the widow is provided for.* In this case, then, where there is a mother and brothers and sisters of the deceased, the whole estate would go to the mother, if there was a father alive; and the brothers and sisters would not be entitled to any part of the inheritance. For § 4. of the same act recites, *that if the intestate shall not leave a child or other lineal descendant, but shall leave a widow and a father, or mother, the widow shall be entitled to one moiety of the estate, and the father, or, if he be dead, the mother shall be entitled to the other moiety.* Here we see a moiety vested in the mother, in case there are no children and no father; and by the former clause, the other moiety becomes absolutely vested in her, if no widow, children or father survive the intestate.

Or other ascendant] Here it is manifest by the civil law, that ascendants, of whatever degree, shall be preferred before all collaterals, (except in the case of brothers and sisters as aforesaid). But by Holt chief justice, in the case of *Blackborough and Davis*, it was holden, that this is altered by the statute; which prefers the next of kin, though collaterals, before one, though lineal, that is more remote. 1 *P. Will.* 51.

In the said case of *Blackborough and Davis*, E. 13. *W.* Administration being granted to the grand-mother, the aunt moved for a mandamus to have it granted to her, urging, that the first administration was void, she being nearer in degree. But by Holt chief justice: In such case it is not void, but only voidable; and it is a matter properly contestible in the spiritual court. And if they are in equal degree, the spiritual court hath election. And the grand-mother is as near as the aunt, because the descent to either would be a mediate descent, the medium of which is the father. But the court thought the advantage on the grand-mother's side, in this respect, that she stands in the right line. Afterwards the aunt moved for a mandamus to have *distribution*, being in equal degree. On the contrary, it was argued, that she was not entitled to it, being not so near as the grand-mother; for the grand-mother stands in the place of the mother, and is in the second degree to the intestate; the aunts are the daughters of the grand-mother, and the daughters cannot be in equal degree with their mother. And by Holt chief justice: no mandamus ought to be in this case. And he said, as by the common law, father and mother were nearer than brother

* In force here.

ther and sister, so grand-father and grand-mother are nearer than uncle and aunt. And the grand-mother, in this case, is the root of the kindred, whereas the aunt is only a branch. 1 *Salk.* 38, 351. *Prec. Cha.* 527. 12 *Mod.* 623. 1 *P. Will.* 51. *L. Raym.* 684.

So, in the cause of *Woodroffe* and *Wickworth*, in the court of chancery, T. 1719; it was clearly agreed, that if one dies intestate, leaving a grand-mother, and uncles, and aunts, the grand-mother is entitled to the personal estate, in exclusion of the uncles and aunts. *Prec. Cha.* 527.

But our act of assembly differs with the above recited Novel in this respect; for, although it prefers fathers and mothers altogether to the collateral line with the Novel, yet brothers and sisters are preferred to ascendants of a higher degree (and not put upon the same footing as in the Novel) than that of fathers and mothers; for, *if the intestate shall not leave a lineal descendant, father or mother, but shall leave a widow, and brothers and sisters, or brother or sister, of the whole blood, the widow shall be entitled to one moiety of the estate, and the brothers and sisters, or brother and sister, to the other moiety as tenants in common.* § 5, No. 1602, *Pub. Acts.*

If divers ascendants are living, we prefer those who are in the nearest degree, whether they are male or female, paternal or maternal] And conformable hereunto are the words of the statute, and in such case the distribution shall be made amongst the next of kindred who are in equal degree. So, in the case of *Moor* and *Barkham*, May 13, 1723, where the next of kindred to the intestate were a grand-father by the father's side, and a grand-mother by the mother's side; it was decreed, that they shall take in equal moieties, as being in equal degree; for though the grand-father by the father's side, may, in some respects, be more worthy of blood, (as in case of the descent of lands) yet, in this respect, dignity of blood is not material. 1 *P. Will.* 53.

And to the same purport is the 7th § of the act above recited, which enacts, *that if the intestate shall leave no lineal descendant, father, mother, brother, or sister of the whole blood, or their children, or brother or sister of the half blood, then the widow shall take one moiety, and the lineal ancestor or ancestors, if any there be, the other moiety.* No. 1602, *Pub. Acts.* By which I suppose the preference is intended to be given to those ascendants who are in the nearest and in equal degree of kindred to the deceased intestate, and equally to be distributed.

And when several ascendants concur in the same degree, the inheritance of the deceased must be so divided, that the ascendants on the part of the father may receive one half, and the ascendants on the part of the mother the other half, without regard to the number of persons on either side] By the custom of France (Mr. Domat tells us), in pursuance of the rule *paterna paternis, materna maternis*, the remotest ascendants are preferred to those that are nearer, with respect to the goods descended from their stock. And this, he says, seemeth to be more equitable and natural; and there seemeth even to be something of a hardship in the contrary rule. 1 *Strah. Dom.* 639.

And in respect of the descent of lands in England, the rule holdeth, that lands which came by the father shall descend to the heirs on the part of the father, and the lands which came by the mother shall descend

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to the heirs on the part of the mother. But with respect to the distribution of personal estate, the statute requires an equal distribution amongst all such ascendants as are in equal degree.

CHAPTER III. *Of the Succession of Collaterals.*

“ IF a person leaves neither descendants nor ascendants at the time of his death, we first call his brothers and sisters of the whole blood, whom we have also called to inherit with the fathers of deceased persons. And when there are no brothers of the whole blood with the deceased, we call those who are either by the same father only, or by the same mother. And if the deceased leaves brothers, and also nephews by a deceased brother or sister; those nephews shall be called to succeed with their uncles and aunts of the whole blood to the deceased: but however numerous those nephews are, they shall be entitled only to that share which their parent would have taken, if alive. From whence it follows, that if a man dies, and is survived by the children of a deceased brother of the whole blood, and also by brothers of the half blood, then his nephews (that is, the children of his brother by the whole blood) are to be preferred to their uncles and aunts; for although such nephews are themselves in the third degree, yet they are preferred, as their parent would have been if living. And on the contrary, if a man dies, and is survived by a brother of the whole blood, and by children of a brother of the half blood deceased, these nephews are excluded, as their father would have been, if he had lived. But among collaterals, we allow the privilege of representation to the sons and daughters of brothers and sisters, and no farther; and we grant it only to brothers’ and sisters’ children, when they concur with their uncles or aunts, paternal or maternal: for when descendants are called to inherit, we by no means permit the children of a deceased brother or sister to share in the succession; although the father or mother was of the whole blood with the deceased brother. But we have so far allowed the right of representation to brothers’ and sisters’ children, that being only in the third degree, they are called to inherit with those who are in the second: And this is evident, because brother’s and sister’s children are preferred to the uncles and aunts of the deceased, paternal as well as maternal; although they are all in the third degree of cognation.—But if a deceased person leaves neither brothers nor sisters, nor brothers’ nor sisters’ children, we then call all the other collaterals, according to the prerogative of their respective degrees, preferring the nearer to the more remote: and if several are found in the same degree, the inheritance must be divided according to the number of persons. And this manner of dividing an inheritance is called a division *in capita*.” *Harr. Justin. ibid.*

Of the whole blood] We must here observe, in relation to the distinction between the whole blood and the half blood, that the law of *England* is different in this particular, according as the succession regards lands of inheritance, or personal estate. In the case of inheritances, the

the whole blood is always preferred, and the half blood is no blood inheritable by descent. In succession to personal estate, the law hath been more uncertain; inasmuch as the statute takes no notice of this distinction between the whole blood and the half blood, but directs the distribution to be made amongst the next of kindred in equal degree to the intestate. But being certain, that brothers and sisters of the half blood are in the same degree with brothers and sisters of the whole blood, it hath been the general opinion, that, according to the said statute, brothers and sisters of the half blood are entitled to an equal share of the intestate's estate, with the brothers and sisters of the whole blood; although there are several precedents of judgments given, since the statute, allowing the half blood to have but an half share. But the law, in this particular, is now become fixed and certain, ever since the decree of the house of lords, in the case of *Watts and Croke*, upon an appeal from a decree in chancery, which had been given in favour of the half blood, and which was affirmed by the house of lords. 1 *Strah. Domat.* 658.

Our law is not quite so general as the civil law comprized in the above recited Novel, (which speaks of ascendants in general terms) but it confines the preference to fathers and mothers. *If the intestate shall not leave a lineal descendant, father or mother, but shall leave a widow, and brothers and sisters, or brother or sister of the whole blood, the widow shall be entitled to one moiety of the estate, and the brothers and sisters, or brother or sister, to the other moiety, as tenants in common.* § 5, No. 1602, *Pub. Acts.* By which we may also take notice, that the half blood, which is in England entitled in this case to take in equal portions with the whole blood, when personal property is to be distributed, is here deprived of that right, if the words "*of the whole blood*" are to be understood after the 2d mention of "*brothers and sisters, or brother or sister,*" as I suppose they are, since the clause seems to be confined to distribution between the widow and children of the whole blood, as those of the half blood are particularly mentioned in the succeeding clause, where their rank of inheritance is especially assigned them. But if this clause should be construed by the courts to exclude the half blood from distribution of the personal estate, which they were formerly entitled to, they have a considerable measure of justice extended to them, in permitting them to participate in the division of the real estate in the next section of the act; for it ordains, that *if the intestate shall leave no lineal descendant, father, mother, brother or sister of the whole blood, but shall leave a widow, and a brother or sister of the half blood, and a child or children of a brother or sister of the whole blood, the widow shall take one moiety of the estate, and the other moiety shall be equally divided between the brothers and sisters of the half blood, and the children of the brothers and sisters of the whole blood; the children of every deceased brother and sister of the whole blood taking among them a share, equal to the share of a brother or sister of the half blood.* But if there be no brother or sister of the half blood, then a moiety of the estate shall descend to the child or children of the deceased brother or sister. And if there be no child of a deceased brother or sister of the whole blood, then the said moiety shall descend to the brothers and sisters of the half blood. § 6, No. 1602, *Pub. Acts.*

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This shall likewise extend to a *posthumous* brother of the half blood. For lord Hardwicke said, he could not distinguish this from the case of a child *in ventre sa mere*. If indeed it were to go to children, born at any distance of time, so as to cause an inconvenience, by suspending the distribution, or to cause a taking back again, it might be an objection: But that cannot happen, because the child must be *in rerum natura* at the death of the intestate brother, whose estate is in question; but, at the utmost, it cannot be carried beyond the year, in which a distribution is to be made. *Burnet and Man*. Nov. 16, 1748. *Vez.* 156.

But, by the escheat law, it is enacted, that nothing in that act shall be construed to vest in the state the property of which any person died possessed, interested in, or entitled to, where such person has left any relation of the half blood, but the same shall be, and is hereby vested in such person of the half blood: and where lands have come by descent or purchase to a female; and such lands have passed, or may hereafter, by occupancy, pass to the husband and his descendants, or others claiming under him or them, in default of heirs on the side of such female, they shall not be subject to the operation of this law. *No.* 1490, § 14, *Pub. Acts*.

If the deceased leaves brothers, and also nephews] In the case of *Walsh and Walsh*, *M.* 1695. A man had three brothers; one of them died, leaving three children; another died, leaving two; and the third died, leaving five children; after which he himself died intestate. It was resolved, that distribution should be *per capita*, and not *per stirpes*; and that all the children should have equal; because none of them take by way of representation, but all as next of kindred in equal degree. *Prec. Cha.* 54.

The act of assembly declares, that the children of a deceased brother or sister shall take among them respectively, the share which their respective ancestors would have been entitled to had they survived the intestate. § 5.

So, in the case of *Janson and Bury*, *H.* 1723. Lord chief baron Bury had several brothers and sisters, some of the half, and some of the whole blood, who all died in his life-time, all leaving several children. And now, upon a bill exhibited for the distribution of his estate, it was decreed by the whole court of exchequer, that the distribution should be *per capita*, and not *per stirpes*; for now they do not take by representation, but as next of kin to the intestate. But if one of the brothers or sisters of the chief baron had survived him, the children of the rest must have taken only by representation, that is to say, *per stirpes*. And the case in this court, between *Wall and Theedham*, was cited, which was on June 28, 1711. Doctor Wall, the intestate, had two sisters; Susanna, of the half blood, who left Samuel; Elizabeth, of the whole blood, who left John, Mary, and Dorothy. Both the sisters died in the life-time of Doctor Wall. His wife, as administratrix, preferred a bill for direction in the distribution; and the court decreed one moiety of the intestate's estate to the wife; and the other moiety to be divided into four parts, one part for the issue of

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Susanna,

Susanna, and three for the issue of Elizabeth. And no distinction was made between the whole and the half blood. *Bunb.* 159.

And so much for the 118th Novel of Justinian. We now proceed with the explanation of the other parts of the statute of distribution, and of the other statutes consequent thereupon.

No representatives admitted among collaterals after brother's and sister's children] In the case of *Maw and Harding*, T. 1691: the question was, whether the words of the statute are to be intended of brothers and sisters to the intestate; or whether, when distribution falls out amongst brothers and sisters, though remote relations to the intestate, representation shall be admitted amongst them. And the court held, that the representation should be only between the brothers and sisters to the intestate. 2 *Vern.* 233.

In the case of *Pett and Pett*, T. 1700. The persons claiming distribution were a deceased brother's daughter, and the grand-children of another deceased brother. And it was held by the court, that the deceased brother's daughter only was entitled; and that a deceased brother's or sister's grand-children shall not come in with a deceased brother's or sister's children. 1 *P. Will.* 25. 1 *Salk.* 250.

So, in the case of *Bowers and Littlewood*, M. 1719. A man died intestate, leaving no wife or child, brother or sister, but his next of kin were an uncle by his mother's side, and a deceased aunt's child. The latter brought a bill against the uncle for a share of the intestate's estate. To which the defendant demurred; and the demurrer was allowed. And the lord chancellor said, that the case of *Pett and Pett* was in point; and that what had been urged in regard to the hardship of the case, was nothing; for so it may seem hard, that if an intestate leaves a deceased brother's only son, and ten children of a deceased half sister, the ten children shall take ten parts in eleven with the son of the deceased brother, and yet the law is so, because they all take *per capita*, and not by way of representation. 1 *P. Will.* 594.

In case there be no child, then to the next of kindred in equal degree] In the case of *Durand and Prestwood*, June 30, 1738. The intestate left two aunts, and a nephew and a niece (children of a brother deceased). By the lord chancellor Hardwicke; the surplus must be divided into four parts equally amongst them, they being all in equal degree, and therefore the children do not take *per stirpem*, but *per capita*; but if the father of the nieces had been living, he would have taken the whole. 1 *Atk.* 455.

That no such distribution of the goods of any person dying intestate be made till after one year] But the right to the distributive share vests immediately on the intestate's death. As in the case of *Grice and Grice*, H. 1708. Where a person, entitled to a distributory share of an intestate's estate, died within a year after the intestate, it was decreed, that although by the statute no distribution is to be made within a year, yet the share of the deceased person is an interest vested, transmissible to his executors or administrators; for in this sense the statute makes a will for the intestate, and it is as if a legacy was bequeathed, payable a year hence; which would plainly be an interest vested presently. Nay, where one died without wife or issue, and intestate, leaving a father,

father, who also died before taking out administration, or altering the property of the estate; yet, by the statute, the right to the intestate's personal estate vested in the father, and consequently belonged to his executors or administrators, and not to the next of kin to the first intestate, who, in this case, happened to be a different person.

3 *P. Will.* 49.

Husband may demand and have administration] By this explanatory act of the 29 C. 2. the right of husbands is saved, of administering to their wives' rights, credits and other personal estates.—In the case of *Cary and Taylor*, *M.* 1693. The wife, entitled by the statute of distribution, died before any distribution was made, and the husband died soon after without taking administration to his wife: It was decreed, that the wife's share should go to the husband's administrator, and not to the administrator of the wife. 2 *Vern.* 392.

M. 1718. *Squib and Wynne*. A wife entitled, by the death of her sister, to a personal estate, consisting of things in action, died; her husband married again, and died intestate, without having taken administration to his first wife. The second wife took out administration to him, and also to the first wife, of the goods not administered by the husband. And it was decreed, that the first wife's share of her sister's personal estate should go to the administratrix of the husband. And the lord chancellor Cowper said, that the exception in the statute of the 29 C. 2. doth not confine it to the life of the husband, or to the circumstance of his having reduced any part of the wife's personal estate into possession, but provides, that no part of her estate shall be distributed among her relations after her. 1 *P. Will.* 378.

M. 1718. *Cart and Reeves*. A wife died possessed of things in action. The husband survived, and died, without taking out letters of administration to his wife. After which the next of kin to the wife administered to her. And the lord chancellor Macclesfield held that the wife's administrator was but a trustee for the executor of the husband. And he said, that this clause in the act was made in favour of the husband, and not to his prejudice; so that it was intended by the parliament, that the husband should be within the statute of distribution, so as to take the wife's things in action as to his benefit, but should not be within the same as to his prejudice; for were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute. 1 *P. Will.* 381. And the reporter adds, that Mr. Vernon cited the case of lady *Aiscough*, wherein he said, lord Cowper's opinion was the same with the lord Macclesfield's, that the wife's things in action did vest in the husband by the statute of distribution; so that since this resolution, the right of administration follows the right of the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin to the husband, in the same manner as it is granted to a residuary legatee. *Id.* 382.

For, if a husband survive his wife, all interests vested in her belong to him; and although he dies without getting them in, or taking out administration to her, yet they belong to his representatives, and not to her's. 2 *Abr. Eq. Cas.* 424.

So,

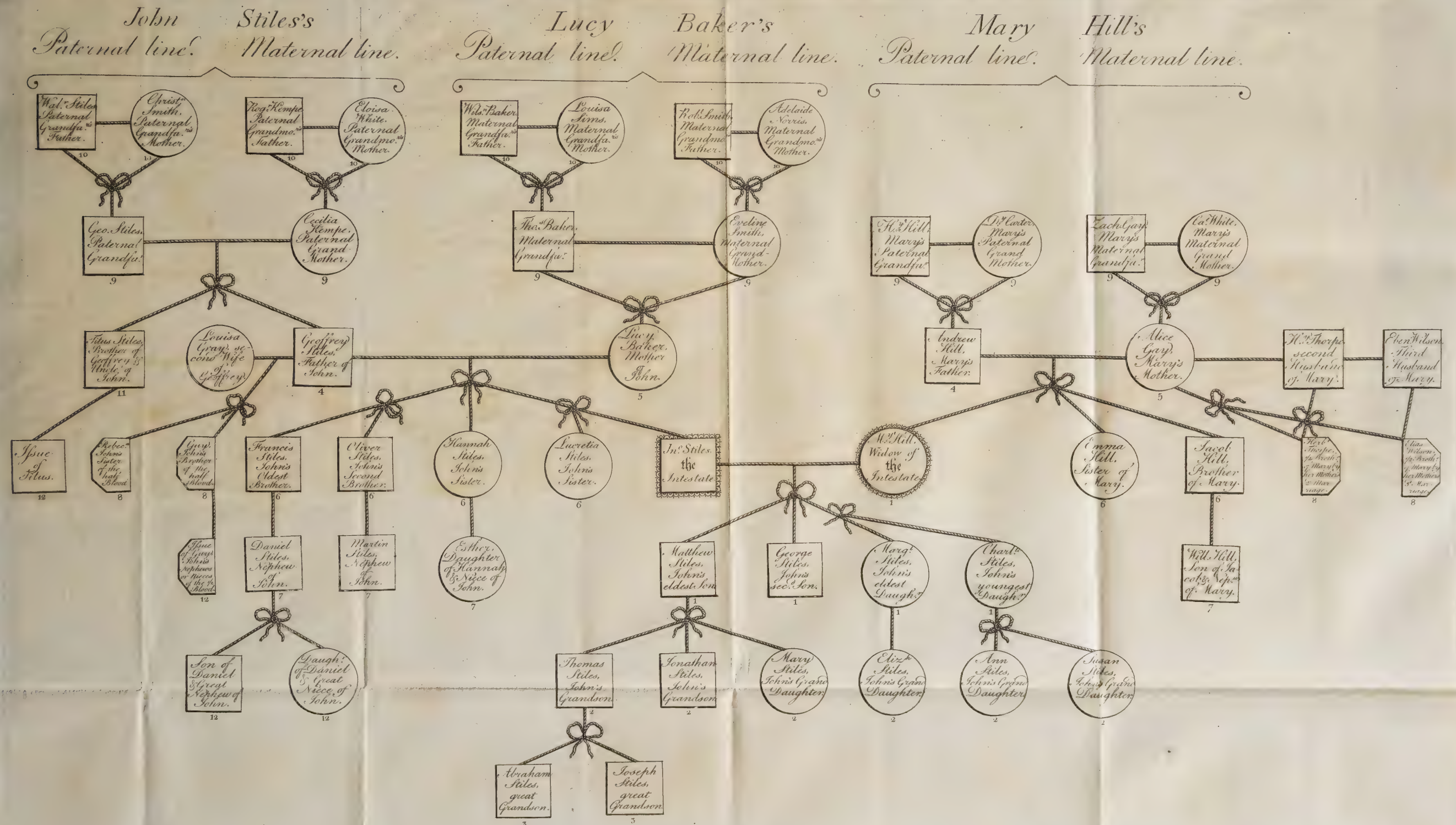
So, in the case of *Humphreys and Bullen, T. 1737*. The wife had a legacy left her by her husband; and after married a second husband, and died. Her second husband took out administration to her, but died before he received the legacy. His next of kin took out administration to him, and received the legacy. Another person took out administration to the wife of the goods not administered, and brought a bill against the husband's administrator to repay the money. The question was, whether it belonged to the plaintiff in that right, or to the defendant, as representative of the husband. The lord chancellor *Hardwicke* thought it so clear for the defendant, that he would not suffer it to be argued. He said, this is a plain case, taking it as it stood on the old statutes of administration, for thereby the husband was entitled to administration if he survived his wife. And as it stood on these statutes, nobody could call him to an account for the effects, for the party was to administer for the good of the soul, but not to make a distribution. But, by the * 22 & 23 C. 2. c. 10. administrators are liable to make distribution, one third to the wife of the intestate, and so on. Yet, upon the penning of that statute, though no notice was taken of the husband being administrator of his wife, it was held not to be within the act; for no person could be in equal degree to the wife with the husband, and so he was not subject to the statute of distribution. Which matter is explained by the * 29 C. 2. c. 3. § 25. which says, the husband may demand administration of his deceased wife's personal estate, and recover and enjoy the same, as he might have done before that act, which was (before that act) as his own property. And if, before the statute of distribution, the husband had died before he had called in the effects of his wife, and any other person had taken out administration to the wife, he would have been a trustee for the husband. So, in the case of *Cart and Reeves*, in lord Macclesfield's time, it was held, that an administrator *de bonis non* of the wife, was a trustee for the representative of the husband. Therefore, though, in point of law, the plaintiff may be representative of the wife, yet he is only a trustee for the next of kin to the husband; and then the plaintiff, by bringing this bill against the person for whom he is intrusted, has been guilty of a breach of trust; so his bill must be dismissed, with costs. 2 *Abr. Cas. Eq.* 445.

After the first day of May next, any person who may be entitled to a distributive share of any estate, real or personal, and shall have arrived to the age of 21 years, or be married, may apply, by petition, to the court of equity or common pleas (at the option of the party) for a writ of partition, to be directed to certain commissioners, authorizing and requiring them to divide the said estate; and the court shall thereupon issue a writ of partition, in the same manner as is directed for the admeasurement of dower by the act, No. 1432. And the commissioners so to be appointed, being first duly sworn, fairly and impartially to perform their duty, shall proceed to execute the said writ, and return the same to the court. And when the said estate cannot, in the opinion of the commissioners, be fairly and equally divided between the parties interested therein, withut main-
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A TABLE of Inheritance, agreeable to the ACT of Assembly, passed the 19th of February, 1791.



fest injury to them, or some or one of them, then they shall make a special return of the whole property, and the value thereof truly appraised, and certify their opinion to the court, whether it will be most for the benefit of all parties to deliver over to one or more of the parties interested therein, the property which cannot be fairly divided, upon the payment of a sum of money, to be assessed by the said commissioners, or to sell the same at public auction; and the court shall proceed to consider and determine the same. And if it shall appear to the court, that it will be for the benefit of all parties interested in the said estate, that the same should be vested in one person, or more persons, entitled to a portion of the same, on the payment of a sum of money, they shall determine accordingly; and the said person or persons, on the payment of the consideration money, shall be vested with the estate so adjudged to them, as fully and absolutely as the ancestor was vested. But if it shall appear to the court, that it would be more for the interest of the parties that the same should be sold, then they shall direct a sale to be made, on such a credit and on such terms as to them shall seem right; and the property so sold shall stand pledged for the payment of the purchase money. *A. A.* 14 Feb. 1791.

The judges of the respective county courts are hereby authorized, from time to time, to make such rules and orders as may be necessary for the purpose of carrying the foregoing clauses into effect. *Id.*

Having annexed the following table of descents (or, more properly speaking, of inheritance) it may not be thought unnecessary perhaps to add a few words in explanation thereof.

1st. John Stiles, the intestate, is supposed to have married Mary Hill, who survived him; and by whom he had two sons, Matthew and George, and two daughters, Margaret and Charlotte; and that he left an estate, of real and personal property, worth £6000. In this case, Mary, the widow, takes one third of the estate; the four children the remainder, equally divided amongst them. Widow £2000. and Matthew, George, Margaret and Charlotte £1000. each.

2d. Suppose John Stiles left a widow and only one child, then the widow would be entitled to one third, and the child (whether male or female) to the remaining two thirds. Widow £2000. child £4000.

3d. Suppose John Stiles left a widow and four children, (whether male or female) and that Matthew and Charlotte were by a former wife, and that George and Margaret were the issue of John and the widow; in this case, the division would be precisely the same as in the first section, for they are all the children of John, from whom the estate descends.

4th. Supposing that Matthew had died before his father, leaving Thomas, Jonathan and Mary, his children; that Margaret and Charlotte had died also before their father; the former leaving one child, Elizabeth; and Charlotte, the latter, leaving two children, Ann and Susan: in this case the widow would have taken her third of the estate as before; the three children of Matthew would have inherited their father's (Matthew's) portion of one fourth of the remainder; George would have been entitled to his share as above-mentioned; Elizabeth would have

have taken her mother's portion; and Ann and Susan would have divided equally the portion of Charlotte, their mother. Widow £2000. Thomas, Jonathan and Mary (Matthew's children) £333. 16s. 8d. each; George, the surviving son, £1000. Elizabeth (the daughter of Margaret) £1000. and Ann and Susan (the daughters of Charlotte) £500. each.

5th. Supposing the widow surviving John, who left no children alive, but the six grand-children, as mentioned in the 4th section, then the widow, taking her third, would leave the other two thirds to be equally divided into 3 parts between the children of Matthew, Margaret and Charlotte; that is to say, the 3d part of £4000. the residue of the estate, being £1333. 6s. 8d. would be again divided into 3 parts, between the 3 children of Matthew, who would each of them receive £444. 8s. 10d. as the portion of their respective inheritances; Elizabeth (Margaret's daughter) would receive £1333. 6s. 8d. and Ann and Susan (Charlotte's two daughters) would be entitled to £666. 13s. 4d. each.

6th. If the wife survives her husband John, who leaves Abraham and Joseph alive, (the sons of Thomas, who is the son of Matthew, both of whom, Matthew and Thomas, died before the father of John) likewise George his second son, with the 3 grand-children, Elizabeth, Ann and Susan, alive also, their mothers, Margaret and Charlotte, being dead; then, in this case, there being a child George, grand-children Elizabeth, Ann and Susan, and great-grand-children Abraham and Joseph, the widow, as before, takes her third, and the residue of the estate would be equally divided into 4 parts; one of which Abraham and Joseph, the representatives of their father Thomas, who is the representative of his father Matthew, would equally divide between themselves; George would still be entitled to his integral fourth part; and Elizabeth, Ann and Susan would be entitled to the same shares as was before laid down for them in the fourth section. Widow £2000. Abraham and Joseph £500. each; George £1000. Elizabeth £1000. and Ann and Susan £500. each.

7th. Supposing all the circumstances the same as in the preceding section; and, in addition thereto, that Jonathan and Mary, the children of Matthew, and grand-children of the intestate, were still alive, then the widow, George the son, Elizabeth, Ann and Susan the grand-children, would have taken precisely the same portion of inheritance as mentioned in the said sixth section; but the quota of the estate coming to Matthew's children, Jonathan and Mary, and grand-children Abraham and Joseph, would be subdivided equally into 3 parts; of which Jonathan and Mary would take one each; and the other third would be equally divided between Abraham and Joseph, the representatives of their father Thomas. Widow £2000. George £1000. Elizabeth £1000. Ann and Susan £500. each; Jonathan and Mary £333. 6s. 8d. each; and Abraham and Joseph 166. 13s. 4d. each.

8th. If the widow survives, and there should remain no children, grand-children, or lineal descendant, but a father Geoffry, and several brothers and sisters of the intestate, the widow shall take half of the estate, and Geoffry, the father, the other half; or if there should be no father, but

but a mother, (Lucy Baker) then the mother shall take that moiety to which the father would have been entitled had he been living. Widow £300. father (or, if he be dead, the mother) £3000. even though brothers and sisters of the intestate were living.

9th. Supposing a widow, and no children, or other lineal descendants, and no father or mother, but Francis and Oliver, two brothers, and Hannah and Lucretia, two sisters of the intestate, all of the whole blood; the widow shall be entitled to one moiety, and each of the brothers and sisters to £750. apiece.

10. Supposing all the circumstances the same as in the preceding section, except that Francis, one of the brother's of the intestate, had died previously, leaving Daniel, his son, alive; Oliver also dying, had left Martin, his son, alive; and Hannah had left her daughter, Esther, alive after her decease. The division would be precisely the same as in the foregoing section; the widow taking half of the estate; and Daniel and Martin, the two nephews of John, and Esther, his niece, with Lucretia, John's only surviving sister, would equally divide the remaining moiety between them, receiving each £750. apiece.

11th. Supposing a widow (but no lineal descendant, father or mother, brother or sister of the whole blood) and a child or children of a brother or sister of the whole blood, and a brother or sister of the half blood; namely, Daniel, Martin and Esther, children of Francis; Oliver and Hannah, the brothers and sisters of the whole blood of John, the intestate; and Rebecca, the sister, with Guy, the brother, both of the half blood of the intestate: in this case the widow is still entitled to a moiety, and the other must be equally divided between the nephews, Daniel and Martin, the niece, Esther, the half brother, Guy, and the half sister, Rebecca. Widow £3000. Daniel and Martin, the nephews, £600. each; Esther £600. and Guy and Rebecca £600. apiece likewise.

12th. But supposing all the circumstances the same as in the preceding section, excepting that there are no brothers or sisters of the whole or half blood, and that Daniel is the only surviving child of the brothers or sisters of the half blood, the widow takes her moiety, and Daniel the other moiety; or, if there should be other nephews or nieces alive, their respective parents being dead, they would have taken the said moiety to be equally divided between them, as I apprehend, though the act does not express it to be apportioned in that manner.

13th. Supposing all the circumstances the same as in the former section, excepting that there is no child of a deceased brother or sister, but only a brother or sister of the half blood, the widow takes the half of the estate as before-mentioned, and the brother and sister of the half blood the other half, equally divided between them. Widow £3000. Guy and Rebecca £1500. each.

14th. Supposing a widow, but no lineal descendant, father, mother, brother or sister of the whole blood, or their children, or brother or sister of the half blood, then the widow takes one moiety, and the lineal ancestor or ancestors the other moiety. The widow is entitled, in this case, to £3000. and George Stiles (the paternal grand-father of John, the intestate, and father of Geoffry, who is the father of John the

the intestate) to £1500. and Evelina Smith (the maternal grand-mother of John the intestate, and mother of Lucy Baker, who is the mother of John the intestate) also to £1500. But if Evelina Smith and her husband, Thomas Baker, should not be alive, then George, the paternal grand-father, would take the residue, £3000. and vice versa. And the same division would have taken place if Cæcilia Kempe, the paternal grand-mother, and Thomas Baker, the maternal grand-father, or (if in case of his decease) Evelina Smith had been the survivors.

15th. Supposing all the circumstances the same as in the foregoing section, excepting that, instead of paternal or maternal grand-fathers or grand-mothers being alive, that Walter Stiles, the paternal grand-father's father, Eloiza White, the paternal grand-mother's mother, and Louisa Sims, the maternal grand-father's mother, and Adelaide Norris, the maternal grand-mother's mother, being the survivors, they would divide a moiety of the estate equally between them, (or between such of the ancestors of that denomination as survived) and the widow would take the other moiety: observing, however, that this doctrine runs universally through the whole of the inheritance by the ancestors: that George Stiles would only take one part, although his wife Cæcilia was alive, instead of two; the inheritance being in him, and not in her, unless in case of his death; and the same is to be observed of Roger Kempe, who would be only entitled to one part or dividend, though his wife Eloiza were alive. It must also be here noticed, that Walter Stiles is in the same degree of consanguinity to the intestate as Titus, the brother of Geoffry Stiles, which brother is the uncle of the intestate; notwithstanding which, our law has given the preference to the ancestor.

16th. Supposing no lineal descendant, or ascendant, then the widow takes two thirds of the estate, and the remainder descends to the next of kin; that is, to the uncles and aunts of the intestate; but, if there should be no uncle or aunt, then to the great nephews or great nieces of the intestate, and to the issue of the uncle, (the cousin german of the intestate) who are all in the same degree of consanguinity, to be equally divided amongst them; and I apprehend, that the issue of the uncles or aunts of the half blood would also be entitled to an equal dividend with the persons above-mentioned; because our law has put brothers and sisters of the half blood upon a footing with nephews and nieces of the whole blood; if none of the parents of such nephews or nieces, and none of the brothers and sisters of the intestate, are alive at the time of the death of such intestate: but this case, not being particularly mentioned in the law, remains yet a subject of discussion.

All the above cases suppose a wife living at the decease of the intestate.

17th. Supposing, then, no widow, the provision which has been made for her shall go as the rest of the estate is directed to be distributed. The person, therefore, consulting the canon, or table of inheritances, has only to strike out the widow's name, and then the remainder of the persons mentioned in the rule will be entitled to the estate. As for instance, in the 4th section, which supposes a widow,

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and the father, and brothers, and sisters of the intestate, to be living, by striking out the widow's name, we find, that the father, and the brothers and sisters of the intestate remained alive, but that the father alone (and, in case of his death, the mother of the intestate alone) would take the whole estate in exclusion of the brothers and sisters.

Let us now suppose that the widow dies; if she leaves any children, grand-children, or other lineal descendants from her womb, whether by John Stiles, (or any other husbands whom she might have had, either subsequent or previous to the death of John) *they* would inherit *their* mother's estate in the same way, manner, and proportion, as the surviving lineal descendants of John did at his death; and if she left no lineal descendants, then *her* father (or in case of his death, *her* mother) would have inherited *her* whole estate; and for want of them, the brothers and sisters of the whole blood, or the issue of such brothers and sisters of the whole blood as may have died, with such other brothers and sisters as may then be alive; and if no brothers or sisters of the whole blood be alive, then their issue; and such brothers and sisters of the half blood, equally to be divided amongst them; and so on with *her* relations, and *her* next of kin, as was before explained in the case of the father's relations.

CHAP. XIII. *Account.*

1. EVERY executor takes an oath before the ordinary, that he will execute the will, pay the debts and legacies, and make a true inventory of the goods, &c. *A. A. No. 1582.*

2. By the statute of the 22 and 23 C. 2. c. 10. *The administrator shall give bond to make, or cause to be made, a true and just account of his administration, at a day in such bond to be expressed; and all the residue of the goods, chattels, and credits, which shall be found and remaining upon the said administrator's account, the same being first examined and allowed of by the ecclesiastical judge or judges for the time being, to deliver and pay unto such person or persons respectively, as the said judge or judges, by his or their decree or sentence, shall limit and appoint.*

Every person, who shall hereafter obtain letters of administration from the ordinary, shall give bond in the secretary's office of this state, with sufficient security, to be approved by the ordinary, according to the 22 & 23 C. 2. c. 10. *Pub. Laws, No. 748.*

The administrator, with the will annexed, shall enter into bond, with good and sufficient security, to be approved by the court, in a sum equal to the value of the estate at least; the condition of which bond shall be in form following, to wit:

The condition of this obligation is such, that if the above bound C. D. administrator (with the will annexed) of the goods, chattels, and credits, of E. F. deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which have, or shall come to the hands, or possession, or knowledge of the said C. D. or into the hands, or possession of any other persons for him, and the same so made do exhibit into the said court of ———, at such time as he shall be thereunto required by the said court; and the same goods, chattels,

and credits, do well and truly administer according to law, and make a just and true account of his actings and doings when by law required; and further, do well and truly pay and deliver all the legacies contained and specified in the said will, as far as the said goods, chattels, and credits will extend, and the law require, then this obligation to be void, or else to remain in full force. Which bond shall be made payable to the justices of the county court, and their successors, and recorded in the clerk's office, or to the ordinary of the district, as the case may be, and may be sued, from time to time, by any person injured by the breach thereof, until the whole penalty be recovered; and the damages sustained being assessed on such suit by the verdict of a jury, may be levied by execution, and paid to the party for whom they were assessed. *A. A.*
No. 1582.

Every administrator shall, in open court, when letters of administration are granted to him, take the following oath or affirmation, as the case may be, to wit:

I do solemnly swear, or affirm, that A. B. deceased, died without any will, as far as I know or believe, and that I will well and truly administer all and singular the goods and chattels, rights and credits of the said deceased, and pay all his just debts, as far as the same will extend, and the law requires me; and that I will make a true and perfect inventory of all said goods and chattels, rights and credits, and return a just account thereof when thereunto required. So help me God.

And such administrator shall also enter into bond, with good security, to be approved by the court, in a sum equal to the full value of the estate, with the condition following:—

The condition of the above obligation is such, that if the above bound A. B. administrator of the goods, chattels, and credits of C. D. deceased, do make a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which have, or shall come to the hands, possession, or knowledge of the said A. B. or into the hands or possession of any other person or persons for him, and the same so made do exhibit into the said court of ———, when he shall be thereunto required, and such goods, chattels and credits do well and truly administer according to law, and do make a just and true account of his actings and doings therein, when required by the said court, and all the rest of the said goods, chattels, and credits, which shall be found remaining upon the account of the said administration, the same being first allowed by the said court, shall deliver and pay unto such persons respectively as are entitled to the same by law; and if it shall hereafter appear, that any last will and testament was made by the said deceased, and the same be proved in court, and the executors obtain a certificate of the probate thereof, and the said A. B. do, in such case, if required, render and deliver up the said letters of administration, then this obligation to be void, or else to remain in full force.

Which bond shall be made payable to the justices of the county court, and their successors, and recorded in the clerk's office; or to the ordinary of the district, as the case may be; and may be sued in like manner as is prescribed in the preceding clause of this act, in the case of bonds given by administrators with the will annexed; and if the justices of the county court, who were present at the time of granting

ing letters of administration, or the ordinary of the district, as the case may be, shall fail to take bond and security as aforesaid, such justices, or ordinary, as the case may be, shall be liable to be sued for all the damages arising from such neglect, by any person or persons interested in the estate. *Id.*

3. An account must be passed before the same judge, or his surrogate or successor, that grants the administration: By Dr. Bettesworth. *Floy. 37.*

Executors or administrators shall annually, whilst the estate shall remain in their care or custody, at the first court to be held after the 1st day of January, render to the court of the county, or ordinary of the district, as the case may be, from whom they obtained probate of will, or letters of administration, a just and true account, upon oath, of the receipts and expenditures of such estate the preceding year; which, when examined and approved, shall be deposited with the inventory and appraisement, or other papers belonging to such estate, in the clerk or ordinary's office, as the case may be, there to be kept for the inspection of such persons as may be interested in the said estate; and if any executor or administrator shall neglect to render such annual accounts, he shall not be entitled to any commissions for his trouble in the management of the said estate, and shall moreover be liable to be sued for damages by any person or persons interested in the said estate. *A. A. No. 1582.*

All guardians and trustees, who shall have the care, management or custody of the estates, real or personal, of any infants or minors in this province, shall be obliged, once at least in every 3 years, and so from time to time, to render, upon oath, true and perfect inventories and accounts of all monies, goods, chattels and effects which they shall, from time to time, receive during the minority of such infant or infants, into the secretary's office of this province. *A. A. No. 748.*

4. Dr. Swinburne says, albeit it seemeth, that the executor is not tied to make an account to the *legataries* or *creditors* extra-judicially; yet he supposeth that, at the instance or promotion of such legataries and creditors, he may be compelled to render an account to the ordinary judicially. *Swin. 466.*

But that an executor may exact an account of his co-executor extra-judicially, but not in judgment [that is, in the spiritual court;] but the ordinary may call them both, or either of them, to a judicial account. *Swin. 466.*

5. By the statute of the * 31 Ed. 3. stat. 1. c. 11. *In case where a man dieth intestate, the ordinary shall depute the next and most lawful friends of the deceased person to administer his goods; which deputies shall have an action to demand and recover, as executors, the debts due to the person intestate, in the king's court, for to administer and dispend for the soul of the dead; and shall answer also, in the king's court, to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come.*

And

* In force here.

And by the statute of the * 22 and 23 C. 2. c. 10. *The ordinaries shall and may proceed and call administrators to account, for and touching the goods of any person dying intestate; and upon hearing and due consideration thereof, order and make just and equal distribution of what remaineth clear, (after all debts, funerals, and just expences of every sort first allowed and deducted); and the same distributions decree and settle, and compel such administrators to observe and pay the same by the due course of his majesty's ecclesiastical laws: saving to every one supposing him or themselves aggrieved, their right of appeal, as was always in such cases used.*

But by the statute of the * 1 J. 2. c. 17. It is provided, that no administrator shall be cited according to the said act of the 22 and 23 C. 2. c. 10. to render an account of the personal estate of his intestate (otherwise than by an inventory or inventories thereof), unless it be at the instance or prosecution of some person in behalf of a minor; or having a demand out of such personal estate, as a creditor or next of kin; nor be compellable to account before any the ordinaries or judges by the said act empowered and appointed to take the same, otherwise than as is aforesaid; any thing in the said act to the contrary notwithstanding. § 6.

6. The creditors to whom the testator did owe any thing, and the legataries to whom the testator did bequeath any thing, and all others having interest, are to be cited to be present at the making of the account; otherwise the account made in their absence, and they never called, is not prejudicial unto them. *Swin. 468.*

And forasmuch as proofs made upon the account, at the instance of some one or more persons having interest, do not bind others who are no parties to the suit; therefore, to prevent multiplicity of actions, it behoveth the executor or administrator, when he is cited by any one of the parties to render an account, to cite the next of kindred in special, and all others in general, having or pretending to have interest in the goods of the deceased, to be present, if they think fit, at the rendering and passing of the account. And then, upon their appearance, or contempt in not appearing, the judge will proceed to give sentence, and the account thus determined will be final. And this is expedient to be done, whether at the instance of any party or not; because the witnesses otherwise might be dead before calling for the account; and hereby the executors or administrators of the accountant are freed from giving any further account, which they might not be so well able to do, because they are not supposed to have been privy to the receipts and disbursements of their testator or intestate. *1 Ought. 354, 5, 6.*

7. If any person, having interest, (as, for instance, the son of the deceased, a legatary, creditor, or the like) shall call the executor or administrator to exhibit a true, full, and perfect inventory of the goods of the deceased which have come to his hands, and to give an account of his administration thereof; he who is called in such case, is bound personally to exhibit such inventory and account; and (if the adverse party demand it) to take a corporal oath of the truth thereof; notwithstanding that at another time perhaps an inventory hath been exhibited, *ex officio mero* of the judge, and in the absence of the party, and an account given upon oath. *1 Ought. 345, 6.*

And

* In force here.

And this inventory is not to be exhibited under protestation, (as when an inventory is exhibited in common form, and not at the instance of the party) but absolutely and directly, for a full, true, and perfect inventory of all and every the goods of the deceased, which have come to the said accountant's hands since the death of the deceased. And if he shall exhibit a false or imperfect inventory or account upon his said oath, he shall be guilty of perjury. *Id.* 346.

And the adverse party shall be at liberty to disprove or object against such inventory and account. *Id.* 347.

And he shall make due proof of every payment; that is to say, of lesser sums by his oath, and of greater sums by other proofs, such as the ordinary shall allow. *Swin.* 407.

Particularly, for sums under 40s. his own general oath, as aforesaid, shall be allowed as sufficient; provided that there shall appear no falsehood, or fraudulent division of sums; for sometimes accountants (knowing that all such small sums will be allowed to them upon their said oath) will divide greater sums into less: but if there appear no fraud, such small sums shall be allowed to them as aforesaid, to avoid expences in proving the same, and because it is presumed that the accountant will not forswear himself for obtaining the allowance of such little matters. *1 Ought.* 347, 8.

But, after the death of the executors or administrators, such lesser sums as aforesaid shall not be allowed upon the oath of their executors or administrators; for this can only be done on the oath of those who laid out the money. *Id.* 347.

8. The executor or administrator shall be allowed all reasonable expences, as well in law suits, as for other honest purposes: and this reasonableness of expences to be such, as that he may receive thereby neither profit nor loss. *Lind.* 178.

And, therefore, he shall be allowed his expences in secular courts, over and above such costs as were allowed there. *Floy.* 37.

9. Where an executor puts out money upon a real security, which, at that time, there was no reason to object to, and afterwards such security proves bad; he shall not be accountable for the loss. *1 P. Will.* 141.

So, if the executor pay the assets into the hands of a banker, his co-executor, whom the testator used to intrust with his money, after which, the banker fails, the executor shall not be chargeable with the loss. *1 P. Will.* 243.

10. After due examination of the account as aforesaid, the ordinary, finding the same to be true and perfect, may pronounce, from the validity thereof; and the executor or administrator ought to be acquitted and discharged from further molestation and suits; neither ought they to be called by the ordinary to any farther account. *Swin.* 469.

11. A party, praying an account, having an interest, is not to be condemned in costs; unless he object thereto, and fails in his proof. *Floy.* 38.

12. *M.* 35 *C.* 2. *Brown* and the archbishop of *Canterbury* against *Willis*. An action of debt was brought upon a bond conditioned for the payment of £ 300. wherein one *Brown* was bound to the archbishop,

shop, that the administrator of *T. S.* should truly administer, and exhibit a true inventory of the intestate's estate, and give a just account of his administration. The defendant pleaded, that he had exhibited a true inventory, and given a just account. The plaintiff replied, that the intestate owed £200. to *E. G.* by bond, and that his goods to that value came to the administrator's hands, and assigns breach in not paying that debt. And upon a demurrer to this application, the plaintiff had judgment. But it was reversed in the exchequer chamber, because the breach was not within the meaning of the condition of that bond. *Lutw.* 882.

H. 6. An. Archbishop of Canterbury and Willis. In debt upon a bond entered into by an administrator to the ordinary, upon taking letters of administration, the question was, whether an administrator, by virtue of this obligation, was bound to go, and give in his account in the spiritual court, without being cited? And by Holt chief justice, who delivered the opinion of the court, 1. It appears by the statute of *Ed. 3.* that an executor was compellable to account before the ordinary, and so was an administrator: but that the ordinary was to take the account as given in, and could not oblige them to prove the items of it, nor swear to the truth of them. So it was if a creditor sued in the ecclesiastical court; for he had a proper remedy at common law. But if a legatee had sued for an account in the ecclesiastical court, the defendant before the statute was compellable to prove the whole account; for the legatee had no other remedy, and the ecclesiastical court, which had a jurisdiction of legacies, could not otherwise do right: Yet in such a case, if the executor would pay him, he could not sue farther, for he had right done him, and the executor was not liable, but of necessity that right might be done. 2. A person entitled to distribution on the 22 *C. 2.* is in consequence entitled to sue for an account as a legatee was; for the next of kin is a legatee by the statute, and as a statute-legatee shall have the same remedy as the other legatee might before the statute. The condition of an arbitrary bond was, to account when required: therefore he was not to account before he was legally cited, which could not be *ex officio*; and therefore the statute of *J. 2.* whereby the ordinary is prohibited from citing him in *ex officio*, had really no effect at all, for the law was so before: But since the statute of *C. 2.* the condition of administration bonds being, that he account at a day certain, he must account accordingly at his peril, and that without citation or suit, and this account must be in court; and if he comes at the day, and no court is held, he shall be excused; for he may plead he was there ready, and no court held. But then this account is not examinable, unless a party interested comes in and controverts it. And whereas, by the words of the condition, he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate; and therefore the creditor shall not take an assignment of the bond and sue it, and assign for breach the non-payment of a debt to him, or a *devastavit* committed by the administrator, for that would be endless, and the bond doth not extend to that. 2 *Salk.* 315, 316.

WILLS. *Account.*

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13. *Fees of the Ordinary.*

	£.	s.	d.
For a marriage licence, bond, and registering,	1	0	0
For a citation, and recording,	0	2	6
For qualifying administrators, bond, letters of administration, and warrant of appraisement, recording letters, and oath,	0	14	0
For proving a will, probate, recording and filing the will, and certified copy, where it does not exceed four copy sheets,	0	9	4
And for every other copy sheet,	0	0	5
For qualifying executors, letters testamentary, and recording,	0	5	0
For warrant of appraisement, oath, and recording,	0	5	0
And if renewed,	0	2	6
For filing renunciation of executors, and recording,	0	2	0
For a dedimus to prove a will, and qualifying executors or administrators, and copy of oath,	0	7	0
For guardianship bond, letters, and recording,	0	14	0
For entering caveat, or withdrawing,	0	2	0
For a search,	0	0	8
For hearing a litigated cause,	0	14	0
For swearing and examining each witness,	0	0	6
For recording or copying any other writing, per copy sheet,	0	0	5
For filing petition, for sale of testators' or intestates' effects, examining into the propriety of the proposed sales, and indorsing order thereon,	0	4	8
For examining the accounts of executors and administrators, vouchers and filing; for the 1st year's accounts,	0	14	0
And for every other year,	0	5	0

A. A. 14 Feb. 1791.

County Court Clerks' Fees.

For a citation,	0	1	6
For each administration bond,	0	1	0
For letters of appraisement,	0	1	0
For a dedimus,	0	1	0
For probate of a will,	0	1	0
For granting letters testamentary, with the will annexed,	0	1	6
For recording any of the above instruments, and the appraisement, per copy sheet,	0	5	0
For examining the accounts of executors, and administrators, vouchers, and filing the same, under the inspection of the court; for the 1st year's account,	0	5	0
And for every other year,	0	2	6

CHAP,

CHAP. XIV. *Introduction to the Forms or Precedents here laid down.*

A WILL is to be written on paper or parchment; and whether it be begun with these words, "In the name of God, amen," or with these, "This is the last will and testament," is immaterial; yet the former seeming to be the most usual method, it is here pursued. The testator should be careful in giving a proper description of himself, as with respect to his christian and surname, his place of abode, trade or occupation; which is usually termed his *addition*. Women, who were never married, use the addition of *spinster*; widows, that of *widows*; which are sufficient without mentioning any trade or business. It is well to insert the usual clause, as, *being in health of body*; or, *being sick in body, but of sound mind*, &c.

With respect to legatees, those also should be properly described, as thereby they may be distinguished from any others; and the whole will should be so formed as to leave no room for doubt concerning the testator's intention, and be written in one hand-writing (if possible), without any interlineation or alteration; and if any interlineation or alteration should unavoidably happen to be made therein, mention thereof should be made in the attestation, as in No. V. The general rule is, that the will should be dated the day and year on which the testator signed it; but as it is not necessary to have any witnesses to a will of *personal estate*, (who might prove the actual time when the will was executed by the testator, although he put no date to it) I should rather advise that no date should be inserted in a will of personal estate, especially as now the primogeniture act directs every trifling article of convenience to be distributed, which a testator may purchase after the executing of his will. And as such a will would probably be construed to have been executed so as to prevent a distribution of any late purchases by testator, which would be the means of preventing numberless little feuds and animosities between the parties interested in a will, when some of them, being disappointed in their bequests, might endeavour to subject a number of articles to the distributive operation of the act of assembly; I can see no injury resulting from the omission of the date, but the means of introducing more peace and harmony between all parties concerned, and consequently fewer disputes and less litigation, particularly if the will should be worded in so general a manner as to elude all research which might be made after the time of its execution. And he should put his seal, as well as his name, to the will; for although this is not required by the statute of 29 Car. 2. even with respect to real estate, and as to personal estate, we have seen that less formality is required in executing a will thereof, than a will whereby real estate is affected; and that two witnesses are sufficient, where the will does not concern real estate; yet if a man derives his power of disposing from any deed, by which it is expressed, that he shall dispose by writing, under his hand and seal, &c. it is necessary for the testator to seal his will; as by an omission thereof the disposition hath been held void.

And

And it has been held, that sealing a will is not a sufficient signing within the statute; therefore, it is prudent for the testator both to sign and seal his will in such place as we shall point out at the conclusion of each of the forms or precedents hereafter laid down, where some further observations will occasionally be made.

No. I.

A man, possessed of money, plate, household goods, a leasehold estate for years; another for years determinable on the deaths of three persons named in the lease; and having divers sums of money due to him; but is not possessed of any real estate; gives the whole to his wife.

IN THE NAME OF GOD, AMEN. I, J. S. of —, in the city of —, linen-draper, being in health of body and of sound mind, memory and understanding, praised be God for the same, do make this my last will and testament in manner and form following: I give, devise and bequeath, unto my beloved wife M. S. all my money, securities for money, goods, chattels, estate and effects, of what nature or kind soever: TO HOLD the same unto my said wife, her executors, administrators and assigns: AND I do nominate, constitute, and appoint my said wife sole executrix of this my last will and testament, hereby revoking and making void all and every other will or wills at any time heretofore by me made; and do declare this to be my last will and testament. IN WITNESS whereof I the said J. S. have hereunto set my hand and seal, this — day of —, in the year of our Lord 17 —.*

SIGNED, sealed, declared, and published
by the above-named J. S. as and for his
last will and testament, in the presence of J. S.
us, who, at his request, and in his presence, have subscribed our names as witnesses thereto.†

[Place of
the Seal.]

T. J. ‡
R. H.

No. II.

An unmarried woman, or spinster, possessed of money, household goods, and other personal estate.

1. *Wills to be decently buried in her parish church.*
2. *Gives £ 500. to one brother, £ 600. to another, and £ 300. to a nephew, to be paid when he attains 21 years of age; the interest whereof, in the mean time, to be applied towards his maintenance and education.*
3. *Residue to a brother whom she appoints executor.*

IN THE NAME OF GOD, AMEN. I, S. M. of —, in the parish of —, in the district of —, spinster, being in health
S s of

* Figures are put here for the sake of brevity, and so in the other forms hereafter laid down; yet it is proper to write the whole of the will in words, and that without any contractions.

† If the testator makes two parts or copies of his will, as is sometimes done, say, next after the word "thereto," as we have likewise done to a duplicate thereof.

‡ Witnesses should be disinterested persons.

of body and of sound mind, memory and understanding, praised be God for the same, do make this my last will and testament in manner and form following: FIRST, I will and desire that I may be decently buried in the parish church of — aforesaid; AND I give and bequeath unto my brother J. M. the sum of £500. ALSO, I give and bequeath unto my brother W. M. the sum of £600.* ALSO I give and bequeath to my nephew W. M. son of my brother T. M. deceased, the sum of £300: to be paid to my said nephew when he attains twenty-one years of age; and the interest thereof in the mean time to be paid and applied towards his maintenance and education, in such manner as my executor, herein-after named, shall, in his discretion, think fit. ALL the rest and residue of my money, goods, chattels, estate, and effects, of what nature or kind soever, I give and bequeath unto my brother J. M. AND I do nominate, constitute and appoint my said brother J. sole executor of this my last will and testament; hereby revoking and making void all and every other will and wills at any time heretofore by me made; and do declare this to be my last will and testament. IN WITNESS whereof I have hereunto set my hand and seal, this — day of —, in the year of our Lord 17 —.

SIGNED, sealed, &c. }
[as in No. I.] }

S. M.

[Place of
the Seal.]

No. III.

A widow, possessed of goods, and houses held by leases for terms of years.

1. Gives an house and some household goods to a son.
2. Another house to a daughter.
3. Residue to another son, and appoints him executor.

IN THE NAME OF GOD, AMEN. I, M. K. of the town of —, in the county of —, widow, being sick and weak in body, but of sound mind and memory, praised be God for the same, do make and declare this my last will and testament, in manner and form following: I give, devise, and bequeath unto my son J. K. his executors, administrators and assigns, all that my leasehold dwelling-house, or tenement, situate and being in the town of —, aforesaid, now in the tenure or occupation of F. H. cabinet-maker: AND ALSO, my bureau and book-case with glass doors, my silver quart two-handled cup, marked I. M. K. my large mahogany square table, and mahogany pillar and claw table. 2. ALSO, I give, devise, and bequeath unto my daughter E. K. her executors, administrators and assigns, all that my leasehold dwelling-house, messuage, or tenement, situate and being in the parish of —, in the said county of —, and now in the tenure or occupation of T. J. butcher. 3. ALL the rest, residue and remainder of my estate and effects, of what nature or kind soever, I give, devise,

* When there is no time limited for paying a legacy, the executor has one year after the testator's death for paying it.

devise, and bequeath unto my son T. K. and I do hereby nominate, constitute, and appoint my said son T. sole executor of this my last will and testament:* IN WITNESS whereof I have hereunto set my hand and seal, this — day of —, in the year of our Lord 17 .

SIGNED, sealed, &c. }

M. K.

[as in No. I.] }

[Place of
the Seal.]

No. IV.

A married woman, by virtue of a settlement made previous to her marriage, disposes of personal estate.

1. *Mentions her marriage settlement.*

2. *Gives £ 200. to her husband, £ 100. to her brother, and £ 100. to a cousin.*

3. *Residue to be equally divided between a nephew and niece, if living at testatrix's death; if either be dead, deceased's share to go to the survivor.*

4. *Appoints her brother sole executor.*

IN THE NAME OF GOD, AMEN. I, E. M. now wife of J. M. of the parish of —, in the district of —, late E. F. spinster, being sick and weak in body, but of sound and disposing mind, memory and understanding, praised be God for the same, do hereby, in pursuance and exercise of the power and authority given and reserved to me, in and by the settlement made previous to my marriage with the said J. M. and by force and virtue of all and every the power and powers, authority and authorities in me being, or enabling me thereto,† make my last will and testament in manner following;

* The estates being bequeathed in the form they are by this will; if either of the legatees die in the life-time of the testatrix, the legacy of such will lapse; and if it be either of the legacies given to the first mentioned son or daughter, the same will become the property of the residuary legatee; but if he die during the life of the testatrix, and the other two survive her, the residue may accrue to them as her nearest relatives, yet not by virtue of the will. Now, this the testatrix might have prevented by bequeathing to the same persons in various other forms; as by limitations, or such conditions as she might have thought fit to insert; as, for example, suppose just before the words, "In witness," she had added, "Provided always, and my will is, that in case my said son J. die before me, then I give, devise, and bequeath what I have herein-before bequeathed to him, unto my said daughter E. but in case she die before me, and my said son J. survive me, then I give, &c. what I have herein-before bequeathed to her, unto my said son J. and if my said son T. die before me, and my said son J. and daughter E. survive me, then I give, &c. what I have herein-before bequeathed to my said son T. unto my said son J. and daughter E. equally to be divided between them, and do appoint them joint-executors of this my will. And if all my said children die before me, then I give, &c. all that is herein-before bequeathed to my said children, unto all and every legitimate child or children as shall be begotten and born of their several and respective bodies at the time of my death, equally to be divided, and their several and respective shares paid, assigned and delivered to them, as they shall severally and respectively attain the age of twenty-one years; and for the purpose of thus providing for my said children's children, in case all my said children shall die before me, do appoint my cousins J. and W. T. joint-executors of this my will:" "In witness," &c. (as in the will.)

† It is usual, at the beginning of a married woman's will, to mention, or, as it is properly termed, to recite the substance of the deed of settlement, or bond, if she derives her power of bequeathing from a bond; as the date thereof, the parties thereto,

2. following; that is to say, I give and bequeath unto my beloved husband the sum of £200. Also, I give and bequeath unto my brother W. F. the sum of £100. Also, I give and bequeath
3. unto my consin A. S. widow, the sum of £100. ALL the rest, residue, and remainder of my estate and effects, of what kind or nature soever, which I have or shall have right to dispose of, I give and bequeath unto my nephew and niece, J. and M. F. equally to be divided between them, in case they are both living at the time of my death; but if either of them shall happen to die before me, then I give and bequeath the share of him or her so dying to the survivor of them. AND I do hereby nominate, constitute and appoint my brother W. F. aforesaid, sole executor of this my last will and testament. IN WITNESS whereof I have hereunto set my hand and seal, the — day of —, in the year of our Lord 17 —.

SIGNED, sealed, &c. }
[as in No. I.] }

E. M.

[Place of
the Seal.]

No. V.

A man having money, goods, and effects, but no real estate.

1. Gives to his son £400. To a daughter £300.
2. To two daughters £300. each, to be paid when they attain their several ages of 21 years, or be married: the interest, in the mean time, to be applied for their maintenance.
3. Proviso, if the daughters marry under age, and without their mother's consent, their legacies to go to first mentioned son and daughter.
4. Gives to wife the use of household goods during her life, and the whole thereof to his son after her death.
5. Residue to wife, who is made executrix.

IN THE NAME OF GOD, AMEN. I, J. T. of the parish of —, in the district of —, baker, being in health of body, and of sound mind, memory and understanding, praised be God for the same, do make this my last will and testament in manner following: I give and bequeath to my son T. T. the sum of £400. and to my daughter M. T. the sum of £300. Also, I give and bequeath unto my daughters J. and F. T. the sum of £300. each, to be paid when and as they attain their several and respective ages of 21 years, or on the day or days of their respective marriage, which shall first happen, provided they marry with consent as hereafter mentioned; and until my said daughters J. and F. shall so attain their ages of 21 years, or be married, my will is, that the interest and produce of their several legacies shall be paid and

the estate or effects settled or mentioned therein, and the power the wife has thereby for disposing; which is commonly done in the same or like words as are contained in the settlement or bond: yet, as it often happens, when a married woman has a desire to make her will, that she cannot immediately have recourse to her deed of settlement or bond (the same being usually lodged in a trustee's hands); I have here laid down this concise method, whereby a married woman may effectually dispose of estate or effects, provided she has sufficient power by virtue of any settlement made previous to her marriage for so doing.

- and applied towards their maintenance and education, in such manner as my executrix, herein-after named, shall, according to her discretion, think fit: PROVIDED always, nevertheless, and my will and mind is, that in case one or both of my said daughters J. and F. shall marry before having attained 21 years of age, and without having first obtained consent, in writing, under the hand of my said executrix, then, from and immediately after such one or both of them as may be so married, I do hereby give and bequeath the legacy or said sum of £ 300. of such of my said two daughters as shall be married, without having obtained consent as aforesaid, unto my said son T. and my daughter M. T. equally to be divided between them.* AND I do hereby give to my wife E. T.

† the whole of

the use of one half of my plate, linen, china, household goods

the

and furniture, which shall be in my dwelling-house at a time of my death; TO HOLD, use, occupy, and possess the same during her life; and from and immediately after her death, I give and bequeath the said plate, linen, china, household goods and furniture, unto my aforesaid son T. T. his executors, administrators, and assigns. ALL the rest, residue, and remainder of my money, goods, chattels, estate and effects, of what nature or kind soever,

herein

not a before given and disposed of, after payment of my just debts, funeral expences, and the expence of proving this my will, I give and bequeath unto my said wife, her executors, administrators and assigns; and I do make, nominate, constitute and appoint my said wife sole executrix of this my last will and testament; hereby revoking and making void all and every other will and wills at any time heretofore by me made; and do declare this to be my last will and testament. IN WITNESS whereof I have hereunto set my hand and seal, the — day of —, in the year of our Lord 17 .

SIGNED, sealed, declared and published,
by the above-named J. T. the testator, as
and for his last will and testament (the
above erasure and interlineations therein
being first made, namely, the words (one
half of) erased, and the words (the whole
of) interlined; likewise, the word (the)
and the word (herein) interlined) as and
for his last will and testament, in the pre-
sence of us, who, at his request, and in
his presence, have subscribed our names
as witnesses

J. T.

[Places of
the Seal.]

L. M.
N. O.

No.

* If a legacy in this case is not given over to another, the condition will not be effectual.

† It is common, both in wills and deeds, to cut or scrape out mistakes and wrong words or letters; but it is far better to erase the same in the above form, and to take notice thereof in the attestation, as we have here done for an example.

No. VI.

A man having a large stock in trade, and other personal estate, to a considerable amount; but no real estate.

1. Takes notice that his wife is provided for by settlement, and, as a token of love, gives her some plate, household goods, and mourning.
2. Gives legacies to two brothers for mourning.
3. Residue of household goods, chattels, stock in trade, estate and effects, to two persons upon trust to sell; and the money arising therefrom, and from debts due to him, to place out at interest for the benefit of his son and two daughters, and such other children as he might have living, or his wife be ensient with at the time of his death. The interest to be applied towards their maintenance and education, and the principal to be paid at their several ages of twenty-one years. In case any or either die under age, leaving issue, such to have their parents' share; and in case of all their deaths without issue, wife to have the whole. If she be then dead, testator's brothers to have it.
4. Trustees empowered to alter or change the securities on which the monies be placed, and to apply the children's share of the principal for putting any or either of them to business, or setting them up therein, or advancing them in marriage.
5. Indemnified against expences and involuntary loss.
6. Appointed executors, and constituted guardians with testator's wife.

IN THE NAME OF GOD, AMEN. I, W. W. of the parish of —, in the district of —, upholsterer, being sick and weak in body, but of sound and disposing mind, memory and understanding, thanks be to God for the same, do make this my last will and testament in manner following: WHEREAS my dear and loving wife M. W. is provided for by settlement made on her marriage, and thereby, on my death, will, amongst other things, be entitled to, and possessed of a dwelling-house, or tenement, situate and being at —, in the parish of —, in the said district of —, for the term of her life: Now, in token of the love and affection I have and bear for and towards my said wife, I give and bequeath to her all the plate, linen, china, household goods and furniture of all kinds, which shall be in the aforesaid dwelling-house at the time of my death, and also the sum of 20 guineas for a ring and mourning.

2. AND I give and bequeath to my brothers J. and T. W. the like sum of 20 guineas each for a ring and mourning. ALL the rest, residue, and remainder of my plate, linen, china, household goods and furniture, and all other my goods, chattels, stock in trade, estate and effects, of what nature or kind soever, not herein-before given or bequeathed, I give and bequeath unto J. J. and T. J. TO HOLD to them the said J. J. and T. J. their executors, administrators and assigns; upon this special trust and confidence, nevertheless, that is to say, that they, my said trustees, or the survivor of them, or the executors or administrators of such survivor, do and shall, as soon as convenient after my death, sell and dispose thereof, and call in and receive all such debts, sum or sums of money, as shall be due or owing to me at the time of my death,

and

and place the monies arising by such sale or disposal, and the monies so to be called in and received, upon government, or other good and sufficient security, in their own names, and in such manner as they shall think proper. AND ALSO, in trust, that they do and shall receive the interest and dividends thereof, from time to time, as the same shall become payable, and pay, apply and dispose of the same, or a sufficient part thereof, for and towards the maintenance, education, support, and bringing up of my son J. and my daughters M. and E. W. and such other child or children as I shall have living, or that my said wife may be ensient with at the time of my death, until my said children shall severally and respectively attain their several and respective ages of 21 years; and when and as my said children shall severally and respectively attain their said ages of 21 years, in trust to pay, assign, transfer, and convey all the residue of my said estate and effects, with the interest, dividends, and produce thereof, as shall not have been applied for and towards the maintenance and education of my said children as aforesaid, or for putting any or either of them to business, or otherwise advancing any or either of them in life, pursuant to the power herein-after for that purpose contained, equally unto and amongst all my said children, when and as they shall severally and respectively attain their said ages of 21 years: and in case any or either of my said children shall happen to die before having attained 21 years of age, without leaving issue of his or her body lawfully begotten, then in trust to pay, assign, transfer, and convey all the said residue of my estate and effects, and the interest, dividends, and produce thereof, or such part thereof as shall remain unapplied as aforesaid, unto such of my said children as shall live to attain his, her or their respective age or ages of 21 years, share and share alike, if more than one. But in case any or either of my said children shall happen to die under age, leaving issue of his, her or their body or bodies, lawfully begotten, then in trust to pay, assign, transfer, and convey the part or share of such deceased child or children unto such his, her or their issue, share and share alike (if more than one), when and so soon as they shall severally and respectively attain their several and respective ages of 21 years; and to pay and apply the interest, dividends, and produce thereof, in the mean time, for and towards their respective maintenance and education. But in case all and every of my said children shall happen to die under age, and without leaving issue of his, her or their body or bodies, lawfully begotten, then in trust to pay, assign, transfer, and convey the said residue of my estate and effects, and the interest, dividends, and produce thereof, or such part thereof as shall remain unapplied as aforesaid, unto my said dear and loving wife M. W. her executors, administrators, and assigns. But in case she shall be then dead, then in trust to pay, assign, transfer, and convey the same unto my aforesaid two brothers J. and T. W. or such one of them as shall be then living: and I do hereby empower and direct my said trustees to pay, assign, transfer, and convey the same accordingly. AND I do

authorize

- authorize and empower my said trustees, from time to time, as often as they shall think proper, to alter and change the securities on which the said residue of my estate and effects shall hereafter be placed out, and from time to time, as often as they shall think fit, again to place the same out upon government, or such other good and sufficient security or securities as they shall think proper; and I do hereby also authorize and empower my said trustees to apply the respective part or share of any or either of my aforesaid children, or the respective part or share of any or either of their lawful issues (in case any or either of them die under age, leaving issue as aforesaid) of and in the said residue of my estate and effects, for putting any or either of my said children, his, her or their lawful issue, out to business, or any suitable employ, or for setting him, her or them up in business, or advancing him, her or them respectively, in any employ or otherwise, for his, her or their respective advancement in the world, by marrying, or otherwise howsoever; any thing in this my will contained to the contrary thereof in any wise notwithstanding.
5. AND it is my will and meaning, that my said trustees, or either of them, shall not be liable to answer or make good any loss or losses that shall or may happen to the aforesaid residue of my estate and effects, in placing out the trust monies, according to the directions in this my will, or in transacting any money affairs, or otherwise relating to or concerning the execution of the trusts mentioned in this my will, unless the same shall appear to happen by or through their or either of their wilful neglect or default; nor shall either of them my said trustees be answerable or accountable for the acts, deeds, receipts, or disbursements of the other of them; but each of them shall be answerable only for his own separate acts, deeds, receipts, and disbursements: And I do hereby direct, that my said trustees shall and may pay and reimburse themselves and himself out of the aforesaid residue of my estate and effects, all reasonable and necessary costs, charges, and expences whatsoever, that they or either of them shall or may bear, pay, be put unto, or sustain in or about the execution of this my will, or the trust hereby in them reposed.
6. AND LASTLY, I do hereby nominate, constitute and appoint my said trustees, the said J. J. and T. J. executors of this my last will and testament: and I do hereby also nominate, constitute, and appoint my said wife, so long as she shall continue my widow, and no longer, together with my said trustees, guardians of my aforesaid son J. and my daughters M. and E. W. and of all, any, and every such other child or children as I shall have living, or that my said wife may be ensient with at the time of my death:* and I do hereby revoke and make void all former and other will and wills by me at any time heretofore made; and do declare this to be my last will and testament: IN WITNESS whereof I have at the bottom of the two first sheets of this my will (the whole whereof

* To appoint guardians, any father has power.

whereof is contained in three sheets of paper) subscribed my name, and to this third and last sheet, my hand and seal † the — day of —, in the year of our Lord 17 .

SIGNED, sealed, &c. }
[as in No. I.] }

W. W.

[Place of
the Seal.]

No. VII.

A man possessed of real estates, personal estate, and effects.

1. *Devises a real estate to one in fee-simple.*
2. *An annuity to a sister for life, payable out of every testator's freehold estates, except the estate before devised; to be paid by half-yearly payments, free of all charges, &c. with power for annuitant to enter and distrain after twenty days non-payment.*
3. *Another annuity to wife out of same estates, payable in the same manner, and with the same power to distrain as given to the sister.*
4. *Another to a cousin out of same estates, payable to her at a certain sum per week (exclusive of her husband's controul), with same power to enter for non-payment, as given to the sister.*
5. *Devises the estates chargeable with all the annuities to another sister for life.*
6. *After the sister's death vests the same in trustees, for preserving contingencies, &c.*
7. *Devises the same estates to another sister for life.*
8. *The same to a man for life. Then to devisee's issue, and in default of issue male, to his issue female, and the heirs male of their bodies.*
9. *In default of issue from last-mentioned devisee, devises the estates to a kinsman for life. Then to kinsman's issue.*
10. *Charges the estate with payment of a certain sum, if last-mentioned devisee, or his issue, have them by the devise.*
11. *If last-mentioned devisee die without issue, same estates devised to another person for life, and then to his issue; and on failure thereof, to testator's own right heirs for ever.*
12. *Directs debts, &c. to be paid out of personal estate.*
13. *Devises to a public charity.*
14. *Pecuniary and specific legacies to a sister.*
15. *Residue to wife, and appoints her and a sister executrixes.*

IN THE NAME OF GOD, AMEN. I, T. N. of —, in the city of —, being sick and weak in body, but of sound and disposing mind, memory, and understanding, praised be God for the same, do make and declare this my last will and testament, in

T t manner

† When the will is contained in more than one sheet of paper, the sheets in which it is contained are usually tied together at the top with incle or tape, and then the testator writes his name on the right hand side, at the bottom of each, and puts his seal to the last. The witnesses write their names at the bottom on the left hand side of all the sheets; in the last word whereof, over the place where those write their names, it is wrote "Signed, sealed, &c." (as in No. I.); but in the other sheets only the single word "Witnesses" is wrote just over the place where they write their names.

1. manner and form following; that is to say, I give and devise all that my house or tenement, land, and hereditaments, with the appurtenances, situate, lying and being in the parish of —, in the district of —, and now in the tenure or occupation of D. B. yeoman, unto W. N. of the parish of —, in the said district
2. of —, clerk, his heirs and assigns for ever. Also, I give, grant, and devise unto my sister E. C. widow, and her assigns, for and during the term of her natural life, one clear yearly annuity, rent-charge, or sum of £ 40. of lawful money of the state of South-Carolina, to be issuing and payable out of all and every other my freehold estate or estates, situate and being in the county of — aforesaid, and the county of —, or either of them, or elsewhere, not herein-before devised; the said annuity or rent-charge to be paid to my said sister by equal half-yearly payments, the first whereof to begin and be made at the end and expiration of six calendar months next after my decease, and always to be paid free and clear of and from all manner of taxes, charges and impositions whatsoever, to be taxed, charged, or assessed upon the said annuity, or upon my said sister, in respect thereof by the authority of the legislature of this state or of the United States, or otherwise howsoever; and if it shall happen that the said annuity or rent-charge of £ 40. or any part thereof, shall be behind or unpaid by the space of twenty days next over or after any or either of the said days whereon the same is made payable, and ought to be paid as aforesaid (being lawfully demanded), that then, and from thenceforth, and from time to time, as often as the same or any part thereof shall be so in arrear and unpaid, it shall and may be lawful to and for my said sister E. C. and her assigns, upon the said freehold estate and estates, every or any part or parts thereof, to enter and distrain, and the distress and distresses there found to take, lead, drive, and carry away, and to impound, detain, or otherwise to sell and dispose of the same, until thereby or otherwise she and they shall be lawfully satisfied and paid such annuity or yearly rent-charge, or so much thereof as shall be in arrear, together with all costs, charges and expences whatsoever, as shall be occasioned
3. by such entry, distress and sale.* Also, I give, grant and devise unto my beloved wife J. N. and her assigns, one annuity or clear yearly rent-charge of £ 40. of lawful money of the state of South-Carolina, for and during the term of her natural life, to be issuing and payable out of and from all and every my said other freehold estate and estates aforesaid, not herein-before particularly devised, and to be payable to her half-yearly; in the manner and with the like power for my said wife J. N. to enter upon the said premises, and to make distress and distresses, and to make sale thereof, in case of non-payment of such annuity, or any part thereof, as is herein-before

* This annuity being charged on real estate, the executor has no more concern therewith than he has with a devise of real estate, wherefore the annuitant may enter and make distress and sale without his intervention.—It is most usual to make an annuity payable from the first quarter day after the testator's death, as in No. VIII. clause 2.

- before given to my sister E. C. in case of non-payment of her annuity or rent-charge of £ 40. or any part thereof as aforesaid.
4. Also, I give, grant and devise unto my cousin F. J. wife of J. J. of —, in the county of — aforesaid, tallow-chandler, one other annuity or clear yearly rent-charge of £ 10. 8s. of lawful money of the state of South-Carolina, for and during the term of her natural life, to be issuing and payable out of and from all and every my said other freehold estate and estates aforesaid, not herein-before particularly devised, and to be paid to her weekly after the rate of 4s. a week; and her receipt shall be a sufficient discharge for the same, which shall not be subject to the controul or intermeddling of her said husband J. J. with the like power and with the same authority for the said F. J. to enter upon the said premises, and to make distress and distresses, and to make sale thereof, in case of non-payment of such annuity, or any part thereof, as is herein-before given to my said sister E. C. in case of non-payment of her annuity or rent-charge of £ 40. a year, or any part thereof as aforesaid.
5. Also, I give and devise all and every other my said freehold estate and estates wheresoever as aforesaid, not herein-before particularly devised, but charged and chargeable with the payment of the said respective yearly annuities or rent-charges herein-before particularly mentioned, unto my sister M. N. spinster, for and during the term of her natural life: AND from and immediately after the determination of that estate, I give and devise the same, and every part thereof, unto J. S. and D. D. of —, in the said county of —, gentlemen, and to their heirs, in trust only, to preserve and support the contingent remainders and uses herein-after limited from being defeated, barred or destroyed; and for that purpose, from time to time, and at all times, to make entries and bring actions as occasion may be or require: nevertheless, to permit and suffer the said M. N. to receive and take the rents, issues, and profits thereof, for and during the term of her natural life: AND from and immediately after the decease of my said sister M. N. I give and devise all and every my said other freehold estate and estates, so given to my said sister M. N. for life as aforesaid, and charged and chargeable with the several and respective annuities as aforesaid, unto and to the use of my said sister E. C. during the term of her natural life; and from and immediately after the determination of that estate, then I give and devise the same, and every part thereof, unto the said J. S. and D. D. and their heirs, in trust as aforesaid, to preserve and support, &c. [*as in clause 6, only a different name:*]
6. AND after her decease, then I give and devise all and every my said other freehold estate and estates wheresoever, devised to my said sister E. C. as aforesaid, and charged and chargeable as aforesaid, unto the said W. N. for and during the term of his natural life; and from and immediately after the determination of that estate, I give and devise the same, and every part thereof, unto the said J. S. and D. D. and their heirs, in trust as aforesaid, to preserve and support, &c. [*as in clause 6, only a different name:*] and from and immediately after the decease of the said
- 7.
- 8.

- said W. N. I give and devise all and every my said other freehold estate and estates so given to the said W. N. for life as aforesaid, and charged and chargeable as aforesaid, unto and to the use and behoof of the first son lawfully begotten, or to be begotten of the said W. N. and the heirs-male of the body of such first son lawfully issuing; and for default of such issue, to the use and behoof of the second, third, and all and every other son and sons of the said W. N. and the heirs-male of the body and bodies of such second, third, and other son and sons lawfully begotten or to be begotten, severally and successively, as they shall be in seniority of age and priority of birth; that is to say, the eldest of such son and sons, and the heirs-male of his and their body and bodies, being always to be preferred before the younger of such son and sons, and the heirs-male of his and their body and bodies lawfully to be begotten; and for default of such issue, then I give and devise all and every my said other freehold estate and estates wheresoever as aforesaid devised, to the first daughter of the said W. N. lawfully begotten or to be begotten, and to the heirs-male of the body of such first daughter lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, and all and every other daughter and daughters of the said W. N. and to the heirs-male of the body and bodies of such second, third, and other daughter, lawfully begotten or to be begotten, severally and successively, as they shall be in seniority of age and priority of birth:
9. AND for default of such issue, then I give and devise all and every my said other freehold estate and estates wheresoever, so devised to the issue of the said W. N. as aforesaid, and charged and chargeable as aforesaid, unto and to my kinsman J. B. son of T. B. of —, in the county of — aforesaid, tallow-chandler, by J. his wife, for and during the term of his natural life; and from and immediately after the determination of that estate, then I give and devise the same, and every part thereof, unto the said J. S. and D. D. and their heirs in trust as aforesaid, to preserve and support, &c. [*as in clause 6, only a different name:*] and from and immediately after the decease of the said J. B. I give and devise all and every my said other freehold estate and estates wheresoever, so given to the said J. B. for life, as aforesaid, and charged and chargeable as aforesaid, unto and to the use of the first son of the said J. B. lawfully begotten, &c. [*the same as to the issue of W. N.*
 10. *in clause 8.*] AND my will is, that in case the above-named J. B. or his issue, shall at any time hereafter be seised or possessed of the freehold estates so devised as aforesaid, the sum of £100. shall then be paid to W. B. brother of the said J. B. and I do hereby charge the said estates with the payments thereof accordingly:
 11. AND for default of such issue of the said J. B. I give and devise all and every my said other freehold estate and estates wheresoever, so devised to the issue of the said J. B. as aforesaid, and charged and chargeable with the payment of the several annuities as aforesaid, unto and to T. W. of, &c. and his issue [*in same manner as devised to W. N. in clause 8;*] and for want of such issue, to my own

12. own right heirs for ever.* AND I do will, order and direct, that all my just debts, funeral expences, and the charges of proving this my will, be, by my executors herein-after named, paid and discharged out of my personal estate; and after payment thereof,
13. I give and bequeath to the commissioners of the orphan house for the time being in the city of Charleston, the sum of £ 200. for the use of the said orphan house; the same to be paid within nine
14. months after my decease. ALSO, I give and bequeath unto my said sister E. C. the sum of £ 20. my gold watch, silver pint and
15. quart cups, marked T. N. and all my silver tea-spoons. ALL the rest, residue and remainder of my personal estate, of what nature or kind soever, I give and bequeath the same, and every part thereof (after the payment of my debts, funeral expences, charges of proving this my will, and legacies as aforesaid) unto my said wife J. N. AND I do hereby nominate, constitute, and appoint my said wife J. N. and my said sister E. C. executrixes of this my last will and testament; hereby revoking and making void all former wills and testaments at any time heretofore by me made; and do declare this to be my last will and testament. IN WITNESS whereof I have, at the bottom of the three first sheets of this my will (the whole whereof is contained in four sheets of paper), subscribed my name; and to this fourth and last sheet my hand and seal, the — day of —, in the year of our Lord 17 .

SIGNED, sealed, &c. [as in No. I.
only here must be three witnesses.]

T. N.

[Place of
the Seal.]

No. VIII.

A man makes his will of his real estate only, and devises the same to a single woman, chargeable with an annuity given to his natural daughter thereout.

1. *Devises the estate subject to an annuity.*
2. *Gives the annuity payable half-yearly, with power to enter and distrain after 20 days non-payment.*
3. *Power to enter and receive the rents after 40 days non-payment.*

IN THE NAME OF GOD, AMEN. I, M. J. of the parish of —, in the district of —, being in health of body, and of sound and

* By those devises and limitations begun at clause 5, may be perceived how a man may limit his lands to as many persons as are in being for life, with remainders to as many of them as he thinks fit; and hereby he acts consistent with the rules of law and equity; as here, although neither of the persons to whom those estates are in this manner devised for life, can convey for any longer term than for his or her own life; yet the issue to whom the estates are limited, or either of them, as soon as the condition should have been performed by having issue, may aliene the estate, so as to bar his own children of their inheritance: and afterwards, by re-purchasing the lands (or getting them re-conveyed to himself) obtain a fee-simple absolute that would descend according to the course of the common law. Here we have a description both of a remainder and reversion, as we see estates are given to several persons for life, with limitations to their issue in tail, which are called remainders; and for want of such issue, the testator ultimately gives the estates to his own right heirs for ever, which latter is called a reversion, and this would have existed had the testator made no mention thereof.

- and disposing mind, memory, and understanding, praised be God for the same, do make this my last will, in manner following:
1. I give and devise unto I. P. of the parish of — aforesaid, single woman, all that my tenement, land, and hereditaments, with the appurtenances, situate, lying, and being at —, and now in the tenure or occupation of —; TO HOLD unto her the said I. P. her heirs and assigns for ever; SUBJECT, nevertheless, to, and charged and chargeable with the annuity, yearly rent, or sum of
 2. forty pounds, herein-after mentioned. AND I do hereby give, devise, and bequeath unto J. P. (the natural daughter of the said I. P.) and her assigns, for and during the term of her natural life, one annuity or clear yearly rent or sum of £ 40. of lawful money of the state of South-Carolina, free of all taxes and other deductions laid by this state or the United States, or otherwise, to be issuing and payable out of the said tenement, land and hereditaments, and to be paid and payable by half-yearly payments, at and upon the — days of — and —; the first payment thereof to be on such of the same days as shall first and next happen after my decease; and I do hereby charge and subject the said tenement, land and hereditaments, to and with the payment of the said annuity, yearly rent, or sum of £ 40. accordingly: and my will is, that in case the said annuity, or any part thereof, shall be behind or unpaid by the space of twenty days next after either of the aforesaid days whereon the same is herein-before directed to be paid as aforesaid (being lawfully demanded), that then and so often as the same, or any part thereof, shall be so in arrear, it shall and may be lawful for the said J. P. and her assigns, to enter upon the said premises charged with the said annuity as aforesaid, and distrain for the same, or for so much thereof as shall be so in arrear, and the distresses and distresses then and there found to detain and keep, until she shall be fully paid and satisfied all such arrearages, with costs and charges in and about the making and keeping thereof. AND
 3. in case the said annuity, or any part thereof, shall be behind and unpaid by the space of forty days next after either of the said days of payment whereon the same ought to be paid as aforesaid, that then and so often as the same, or any part thereof, shall be so in arrear, it shall and may be lawful for the said J. P. and her assigns, into all and singular the premises charged with the said annuity as aforesaid, to enter, and the rents, issues, and profits thereof to receive and take, until she be therewith and thereby, or by the person or persons who shall be then entitled to the immediate possession of the premises, paid and satisfied the same, and every part thereof, and all the arrears thereof incurred before, and that shall incur during such time as she shall receive the rents, issues and profits thereof, or be entitled to receive the same by virtue of such entry to be made as aforesaid, together with her cost, charges and expences, laid out and sustained by reason of the non-payment thereof, or any part thereof.* IN WITNESS whereof, I have here-
unto

* Where the will concerns only land there is no need of an executor, neither

unto set my hand and seal, the — day of —, in the year of our Lord 17 .

SIGNED, sealed, &c. [*as in No. I.*
only here must be three witnesses.]

M. J.

[Place of
the Seal.]

No. IX.

A CODICIL, whereby a will is altered and new legacies given.

WHEREAS I, J. M. of — street, in the city of —, hosier, have made and duly executed my last will and testament in writing, bearing date the 4th day of September, 1787, and thereby given and bequeathed the sum of £ 200. unto T. M. NOW, I do hereby revoke and make void the said legacy of £ 200. so given and bequeathed by my said will unto the said T. M. and do give and bequeath the said sum of £ 200. unto J. P. of —, in the city of —, haberdasher; ALSO, I do revoke and make void the two several legacies of £ 100. apiece, given and bequeathed by my said will unto C. H. and W. H. and do give and bequeath unto the said C. H. and W. H. the sum of £ 40. apiece, and no more: AND I do hereby give and bequeath unto R. W. of — lane, in the town of Camden, cordwainer, the sum of £ 120. And I do ordain and declare this present writing to be a codicil to my said will, and that the same shall be annexed thereto, and taking as part thereof; and do confirm my said will in every particular thereof that is not hereby altered or revoked: IN WITNESS whereof I have to this codicil set my hand and seal, the — day of —, in the year of our Lord 17 .

SIGNED, sealed, declared, and published
by the said J. M. as and for a codicil
to be annexed to his last will and testa-
ment, and to be taken as part thereof, in
the presence of

J. M.

[Place of
the Seal.]

[Two witnesses.]

No. X.

A nuncupative will.

THE LAST WILL of T. M. late of — lane, in the city of Charleston, gentleman, deceased, declared by him by word of mouth the 4th day of September, 1785 [*Here insert the words as spoken by the deceased, and conclude thus.*] Those were the words spoken by the said deceased T. M. in the presence of us who have hereunto subscribed our names as witnesses thereof, this — day of —, 17 .

[Three witnesses.]

No. XI.

A release or discharge for a legacy.

TO ALL TO WHOM these presents shall come: I, J. F. of — street, in the city of Charleston, silversmith, send greeting. WHEREAS T. S. late of —, in the said city of Charleston, butcher, deceased, in and by

ought it to be proved in the spiritual court. For establishing the same, and perpetuating the testimony thereof, it may be proved in chancery.

by his last will and testament in writing, bearing date on or about the 4th day of September, 1785, did give and bequeath unto me the said J. F. the sum of £60. and the said T. S. by his said will, made and constituted W. M. and J. D. executors thereof. NOW KNOW ALL by these presents, that I, the said J. F. do hereby acknowledge to have received of and from the said W. M. and J. D. the said sum of £60. so given and bequeathed to me in and by the said will of the said T. S. as aforesaid, and thereof, and of and from every part thereof; do fully, clearly, and absolutely acquit, release, and for ever discharge; the said W. M. and J. D. their heirs, executors, administrators and assigns; and also the estate and effects of the said testator, and every part thereof: AND in consideration thereof, I, the said J. F. do, for myself, my executors, administrators and assigns, remise and release unto the said W. M. and J. D. their heirs, executors and administrators, all and all manner of action and actions, cause and causes of action, suits, legacies, sum and sums of money, judgments, executions, claims and demands whatsoever, both at law and in equity, which against the said W. M. and J. D. their heirs, executors, or administrators, or the estate or effects of the said testator, I the said J. F. ever had, or which I, my executors, administrators, or assigns, can or may have, claim, challenge, or demand, for or by reason or means, or on account of the said sum of £60. so given and bequeathed to me in and by the said last will and testament of the said T. S. as aforesaid. IN WITNESS whereof I the said J. F. have hereunto set my hand and seal, the — day —, in the year of our Lord * 17 .

SEALED and delivered in
the presence of

J. F.

S. S.
N. M.

[Place of
the Seal.]

No.

* Figures are put here for the sake of brevity, but deeds as well as wills should be written in words at full length; and as this and the other forms hereafter laid down are precedents for deeds, we shall make a few brief observations concerning sealing, signing and delivering, or what is termed, executing and witnessing the same, after being written on paper or parchment, in order that thereby the whole proceeding may be made valid in law. And preparatory hereto we may first take notice of what has been mentioned concerning reading a will, which is so applicable to a deed; as for making a good deed, it is requisite that it be read wherever any of the parties desire it; and if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is misrecited, unless it be agreed by collusion that the deed shall be read false on purpose to make it void; for in such case it shall bind the fraudulent party. Black. Com. 2 V. 304. The deed being thus perfectly read, it is requisite that the party seal it, which is usually done by his putting any seal upon the wax and impression made thereon by the person who prepared the deed; or by making a circle with the letters L. S. (Locus Sigilli) within the same, thus (L.S.); which has been determined by the courts of this state to be a legal seal: and likewise he should sign it, by writing his name as in the above form; but if he cannot write his name, he may, as is usual, make a mark with his pen opposite the seal, which is commonly made in this form X. The party having now sealed and signed, the next requisite to perfecting the deed is, that he deliver it

No. XII.

Discharge to executors where the testator bequeathed the residue of his estate and effects to them, upon trust for his children, with a benefit to the survivors if either should die under age.

1. *Recites the will and bequest to the trustees, with the various trusts.*
2. *The trustees' power of applying the children's share for putting them to business, &c.*
3. *That testator left 3 children, all of whom are living, and that the trustees proved his will, &c.*
4. *That one child hath attained 21 years of age; and by the trustees' account the 3 children have been advanced different sums; and that £1000. of testator's estate is undisposed of.*
5. *That for making an equal division, the several sums advanced for each child are added to the £1000. and the whole divided into three equal shares, and out of each separate share deducted the separate sums advanced.*
6. *Child of age releases testator's estate, and the trustees, of all future claim, except what may accrue to him by either of the younger children dying under age.*

TO ALL TO WHOM these presents shall come, A. B. of the parish of —, in the district of —, ironmonger, sends greeting.

- i. WHEREAS C. B. late of the said parish of —, linen-draper, deceased, in and by his last will and testament in writing, bearing date on or about the 8th day of June, 1785, after having thereby bequeathed divers legacies, did give and bequeath all the rest, residue and remainder of his plate, china, household goods, and furniture, and all other his goods, chattels, stock in trade, estate and effects, of what nature or kind soever, to D. E. and F. G. TO HOLD unto them, their executors, administrators, and assigns, upon this special trust and confidence, that they the said trustees, or the survivor of them, or the executors or administrators of such survivor, should, as soon as convenient after his death, sell and dispose thereof, and call in and receive all such debts, sum or sums of money, as should be due or owing to him at the time of his death, and place the moneys arising by such sale or disposal, and the moneys so to be called in and received, upon government or other good and sufficient security, in their own names, and in such manner as they should think proper: AND ALSO in trust, that they should receive the interest and dividends thereof, from time to time, as the same should become payable, and

U u

pay,

absolutely; the usual method whereof is, for him to take the same up in his hand and say, "I deliver this as my act and deed," and thereupon deliver it down on the table or place from whence he took it up, or to the party to whom it is made. From this tradition or delivery the deed only takes effect; for if the date be false or impossible, the delivery ascertains the time of it, and hereby the party delivering adopts the sealing, if another person and not himself should have sealed it, and by a parity of reason, the signing also, and makes them both his own. Black. Com. 2 vol. 306. The deed being thus executed in the presence of witnesses (who should be persons disinterested), those subscribe their names as in the above form.

- pay, apply, and dispose of the same, or a sufficient part thereof, for and towards the maintenance, education, support, and bringing up of his son the said A. and his daughters H. and J. B. and such other child or children as he should have living, or that his wife might be ensient with at the time of his death, until his said children should severally and respectively attain their several and respective ages of 21 years; and when and as his said children should severally and respectively attain their said ages of 21 years, in trust to pay, assign, transfer, and convey all the said residue of his estate and effects, with the interest, dividends, and produce thereof, as should not have been applied for and towards the maintenance and education of his said children as aforesaid, or for putting any or either of them to business, or otherwise advancing any or either of them in life, pursuant to the power in his said will for that purpose afterwards contained, equally unto and amongst all his said children, when and as they should severally and respectively attain their said ages of 21 years; and in case any or either of his said children should happen to die before having attained 21 years of age, without leaving issue of his or her body lawfully begotten, then in trust to pay, assign, transfer and convey all the said residue of his estate and effects, and the interest, dividends, and produce thereof, or such part thereof as should remain unapplied as aforesaid, unto such of his said children as should live to attain his, her, or their respective age or ages of 21 years, share and share alike, if more than one.
2. AND WHEREAS the said C. B. in and by his said will, did authorize and empower his said trustees to apply the respective part or share of any or either of his aforesaid children, of and in the said residue of his estate and effects, for putting any or either of them, his, her, or their lawful issue, out to business, or any suitable employ, or for setting him, her, or them, up in business, or advancing him, her, or them, respectively in any employ or otherwise, for his, her, or their, respective advancement in the world, by marrying or otherwise howsoever; and the said testator nominated, constituted, and appointed the said trustees, the said D. E. and F. G. executors of his said last will and testament, as in and by the same, relation being thereunto had, what is herein-before in part recited will more fully and at large appear.
3. AND WHEREAS the said testator died without altering or revoking his said will, leaving his aforesaid three children, his only issue him surviving (all of whom are now living); and shortly after his death the said D. E. and F. G. proved his said will in the court of ordinary for the district of —, and took upon them the said executorship and trust.
4. AND WHEREAS the said A. B. hath attained his said age of 21 years, and the said trustees have made up an account of and concerning the said residuary estate and effects, and all moneys received and paid by them, in pursuance of the said trust and executorship, whereby it appears they have advanced, paid, laid out and expended, to, for, and on account of the said A. B. the sum of £ 400. to, for, and on account of the said H. B. the sum of £ 300. and to, for, and on account of the said J. B. the

- the sum of £ 250. and that there is now remaining in their hands, and on good security, as placed out by them, the sum of £ 1000. of and belonging to the said residuary estate and effects of the said
5. C. B. AND WHEREAS for making a just and equal division of the said sum of £ 1000. among the aforesaid 3 children, pursuant to the said last will and testament of the said C. B. it is agreed to add the aforesaid three several sums of £ 400. £ 300. £ 250. to the said sum of £ 1000. which makes the same £ 1950. and then to divide the whole into three equal shares, and deduct out of each third part what has respectively been advanced, paid, laid out, and expended, to, for, and on account of each child, whereby the share
6. of the said A. B. therein appears to be the sum of £ 250. Now THESE PRESENTS WITNESS, that as well for and in consideration of the said sum of £ 400. heretofore advanced, paid, laid out, and expended, to, for, and on account of the said A. B. as aforesaid, and of the said sum of £ 250. to him in hand paid by the said D. E. and F. G. at or before the execution of these presents, the receipt whereof is hereby acknowledged, he the said A. B. HATH remised, released, and for ever discharged, and by these presents BOTH remise, release, and for ever discharge the said D. E. and F. G. their executors, administrators and assigns, of and from all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said A. B. of, in, and to the said residue of the estate and effects of the said C. B. deceased, by virtue of his said will, or otherwise howsoever; AND ALSO of and from all and all manner of action and actions, suits, bills, bonds, writings, obligations, debts, dues, duties, reckonings, accounts, sum and sums of money, judgments, executions, quarrels, controversies, trespasses, damages and demands whatsoever, both at law and in equity, or otherwise howsoever, which against the said D. E. and F. G. or either of them, in their or either of their own right, or as trustees, or executors, constituted and appointed in and by the said last will and testament of the said C. B. deceased, or otherwise, he the said A. B. now hath, or ever had, or which he, his executors, administrators or assigns shall or may hereafter have, claim, challenge or demand, for or by reason, or means, or on account thereof, or for, or by reason, or means, or on account of the said residuary estate and effects of the said C. B. or for, or by reason, or means, of any act, matter or thing, incident or relative thereto, from the beginning of the world to the day of the date hereof. (SAVE and except all such estate, right, title and interest, as may accrue to him the said A. B. or which he may at any time hereafter have, claim, challenge or demand, of, in, or unto the said residuary estate and effects of the said C. B. deceased, or any part or parcel thereof, from, by, or on account of the death of both or either of the aforesaid H. and J. B. which is not intended by these presents to be released.) IN WITNESS whereof the said A. B. hath hereunto set his hand and seal, &c. [as in No. XI.]

No. XIII.

*Discharge for legacies by husband and wife.**

TO ALL TO WHOM these presents shall come, A. B. of — street, in the city of Charleston, cordwainer, and C. his wife, send greeting, WHEREAS D. E. late of — street aforesaid, victualler, in and by his last will and testament in writing, bearing date on or about the 8th day of June, 1785, did give and bequeath unto the said C. by her then name and description of his cousin C. F. spinster, the bed, with a mahogany four-post bedstead, bolster and pillow, and the mahogany chest upon drawers, together with six hair-bottom mahogany chairs, and pillow and claw mahogany table board, parcel of the furniture in the room over the dining-room, on the two-pair of stairs in the dwelling-house of the said D. E. and also did give and bequeath unto the said C. the sum of £ 100. and the said D. E. nominated and appointed G. H. and J. K. executors of his said will, who, since his death, have duly proved the same in the court of ordinary for the district of —: AND WHEREAS, since the death of the said D. E. the said C. F. hath intermarried with the said A. B. NOW THESE PRESENTS WITNESS, that the said A. B. and C. his wife, do hereby acknowledge to have received of and from the said G. H. and J. K. the aforesaid bed, four-post bedstead, bolster and pillow, the mahogany chest upon drawers, the six mahogany chairs and table board, and also the said sum of £ 100. so given and bequeathed to the said C. in and by the said last will and testament of the said D. E. as aforesaid; and thereof, and of and from every part thereof, do fully, clearly, and absolutely acquit, release, and for ever discharge, the said G. H. and J. K. their executors, administrators, and assigns, and also the estate and effects of the said testator, and every part thereof: AND, in consideration thereof, they the said A. B. and C. his wife, do, for themselves, their executors, administrators and assigns, remise and release unto the said G. H. and J. K. their executors and administrators, all, and all manner of action and actions, cause and causes of action, suits, legacies, sum and sums of money, judgments, executions, claims, and demands whatsoever, both at law and in equity, which against the said G. H. and J. K. their executors or administrators, or the estate or effects of the said testator, they the said A. B. and C. his wife, or either of them, ever had, or which they, their executors, administrators or assigns, can or may have, claim, challenge or demand, for, or by reason or means, or on account of the said furniture, or the said sum of £ 100. given and bequeathed to the said C. in and by the said last will and testament of the said D. E. as aforesaid. IN WITNESS whereof, the said A. B. and C. his wife, have hereunto set their hands and seals, &c. [as in No. XI. *only here being two persons to execute, there must be two seals to the deed; one for the husband to write his name opposite, and the other for the wife to write her name opposite thereto.*]

No.

* Where any legacy is given to a woman who marries before the same is paid or delivered to her, the husband should join in the discharge. So likewise if a legacy be given to a woman during her marriage, unless in either of those cases it should appear clear by the will that the husband can in no wise have any claim thereto, or interference therewith.

No. XIV.

Release by a new administrator on settling with and receiving goods unadministered from the old.

TO ALL TO WHOM these presents shall come, A. B. of —, in the county of —, gentleman (administrator of his late deceased mother C. B. to whom his deceased father D. B. bequeathed the whole of his estate and effects), sends *greeting*. WHEREAS D. E. uncle of the said A. B. did, in the minority of the said A. B. take out letters of administration of the goods and chattels of the said C. B. deceased, for the benefit of the said A. B. and the other children of the said C. B. AND WHEREAS the said A. B. having attained the age of 21 years, the said D. E. hath resigned up his administration so taken by him as aforesaid, and letters of administration *de bonis non*, are granted to the said A. B. of the said C. B. his mother, for himself and the benefit of his sisters and brother F. G. and H. B. children of the said C. B. deceased: AND WHEREAS the said D. E. and A. B. administrators as aforesaid, have now made up and adjusted all accounts, matters and things, of and concerning all moneys received, paid and disbursed by the said D. E. as administrator as aforesaid, and all other the estate whatsoever of or belonging to the said C. B. deceased, which have been received or come to the hands or disposition of the said D. E. and upon adjusting the said accounts there appears to be remaining in the hands of the said D. E. the sum of £2000. in money, and one bond under the hand and seal of J. K. of —, in the penal sum of £1000. with a condition to be void upon the payment of £500. on the day therein mentioned; which said sum of £2000. together with the said bond and all writings and papers appertaining or belonging to the estate of the said C. B. the said D. E. hath, on the day of the date hereof, paid and delivered up to the said A. B. NOW KNOW ALL by these presents, that the said A. B. doth acknowledge to have received of and from the said D. E. the said sum of £2000. together with the said bond, and all writings and papers appertaining or belonging to the estate of the said C. B. and thereof, and of and from every part thereof, doth fully, clearly, and absolutely acquit, release, and for ever discharge the said D. E. his heirs, executors, and administrators: AND in consideration thereof, and being satisfied in the premises, HATH remised, released, and for ever discharged, and in and by these presents BOTH remise, release, and for ever discharge the said D. E. his heirs, executors and administrators, of and from all reckonings, accounts, sum and sums of money, by him had and received in pursuance of the said administration so granted to him as aforesaid, and of and from all other reckonings, accounts and demands whatsoever, and all and every action and actions, cause and causes of action, suits, judgments, executions, claims and demands, both at law and in equity, or otherwise howsoever, which against the said D. E. he the said A. B. now hath, or ever had, or which he, his executors, or administrators, shall or may have, claim, challenge or demand, for
or

or on account of any act, matter or thing whatsoever, from the beginning of the world to the day of the date of these presents. IN WITNESS whereof the said A. B. hath hereunto set his hand and seal, &c. [as in No. XI.]

No. XV.

Letter of attorney for proving a seaman's will, and doing other business for the executor.

KNOW ALL MEN by these presents, that I, A. B. widow and sole executrix named in the last will and testament of C. B. mariner, late deceased, for divers good causes and considerations me hereunto moving, HAVE made, ordained, authorized, constituted and appointed, and by these presents DO make, ordain, authorize, constitute and appoint D. E. of — street, in the city of —, taylor, my true and lawful attorney, for me, and in my name, to appear before the judge of the court of ordinary for the district of —, and in my name to pray and obtain probate of the said last will and testament of my said deceased husband, for my use and benefit; and when the same is obtained, for me and in my name, or in the name of him the said D. E. to ask, demand, require, and receive, of and from any person or persons, all and every sum and sums of money, now due and owing, or hereafter to become due and owing to me as sole executrix of the aforesaid will, or otherwise howsoever, by means or virtue thereof; and to make any such composition or compositions with any person or persons from whom any such said sum or sums of money is, are, or shall be due and owing to me as aforesaid, for or concerning the same respectively, as he the said D. E. shall think fit, and on receipt of such said sum or sums of money, or any part thereof, to make, sign, seal, and deliver proper and sufficient acquittances, receipts, releases, or discharges therefore, in my name or otherwise; and in case of non-payment, any action or actions, suit or suits, in law or equity, to commence and prosecute for recovery thereof; and one or more attorney or attorneys under him the said D. E. for the purposes aforesaid, to make, constitute, and at his pleasure to revoke; and to do all other lawful acts and things whatsoever, concerning the premises, as fully, in every respect, as I myself might or could do if personally present; ratifying, allowing, and confirming all and whatsoever my said attorney shall lawfully do, or cause to be done, in or about the premises, by virtue of these presents. IN WITNESS whereof I the said A. B. have hereunto set my hand and seal, &c. [as in No. XI.]

No. XVI.

FORM OF AN INVENTORY.

A true and perfect inventory of all the goods, chattels, and personal estate of A. B. late of C. in the county of —, yeoman, deceased, made by us whose names are hereunto subscribed, the — day of —, in the year —

	£.	s.	d.
Fifty negroes, at each	0	0	0
His purse and apparel,	15	0	0
Horses and furniture,	20	0	0
Horned cattle,	27	0	0
Sheep,	20	0	0
Swine,	0	13	0
Poultry,	0	3	4
Plate and other household goods,	18	0	0
One lease of, &c.	30	0	0
Rent in arrear,	25	0	0
Corn growing at the time of his death,	12	0	0
Hay and corn,	10	0	0
Ploughs and other implements of husbandry,	6	10	0
Debts,	100	0	0

Total, 284 6 4

Other debts supposed to be desperate,
Debts owing by the deceased £ 250.

25 2 6

Appraised by us, the day
and year above written:

A. B.

C. D.

E. F.

No. XVII.

Probate.

South-Carolina, }
Charleston district. } *By C. L. esq. ordinary of said district.*

PERSONALLY appeared before me, A. B. who being duly sworn on the Holy Evangelists of Almighty God, doth make oath and say (*that he saw C. D. sign, seal, publish, pronounce, and * declare the same to be and contain his last will and testament*) that he (the said C. D.) was then of sound and disposing mind, memory, and understanding, to the best of the

the

* This is not requisite by the statute.

the deponent's knowledge and belief; and that * he the said A. B. did sign his name as a witness thereto, at the request of the testator, in his presence: at the same time qualified J. K. and L. M. executors. Given under my hand, this — day of —, in the year of our Lord —.
C. L. ordinary of — district.

No. XVIII.

Letters testamentary.

South-Carolina. }
Charleston district. } *By Charles Lining, esquire, ordinary.*

To all to whom these presents shall come, greeting:

† KNOW YE, that on the — day of —, which was in the year of our Lord one thousand seven hundred and —, the last will and testament of —, late of —, in this —, deceased, was proved, approved, and allowed of; the said deceased having, whilst — lived, and at the time of — death, divers goods, rights and credits, within the — aforesaid; by means whereof, the approbation and allowing of — testament, and the power of granting the administration of all and singular the goods, rights and credits of the said deceased, to me is manifestly known to belong; and that the administration of all and singular the goods, rights and credits of the said deceased, and — testament, any manner of way concerning, was granted and committed unto —, named execut— in the said last will and testament; being first sworn on the Holy Evangelists of Almighty God well and faithfully to administer, and make a full and perfect inventory of all and singular the goods, rights and credits of the said deceased, and to exhibit the same into the ordinary's-office in Charleston, in order to be recorded, on or before the — day of —, now next ensuing; and to render a just and true account, calculation and reckoning thereof, when thereunto required.

IN TESTIMONY whereof, I have hereunto set my hand and seal, the — day of —, Anno Dom. 17 —, and in the — year of American Independence.

Ordinary's-Office.

Recorded Book

Page

No.

* If the other witnesses signed it at the same time, it may run thus: And that E. F. and G. H. together with this deponent, signed their names as witnesses thereto, at the request of the testator in his presence, and in the † presence of each other.

† This is given only to the executor who first qualifies, and if any other afterwards come in and qualify, they have a manuscript certificate thereof, and which has no seal (like this) annexed to it.

‡ It is not necessary that all the witnesses should sign their names at the same time, or in the presence of each other.

No. XIX.

Warrant of appraisement.

South-Carolina. }
 Charleston district. } *By Charles Lining, esquire, ordinary.*

THESE are to authorize and empower you, or any three or four of you, whose names are here underwritten, to repair to all such parts and places within this — as you shall be directed unto by —, late of —, deceased, wheresoever any of the goods and chattels of the said deceased are or do remain, within the said parts and places, and which shall be shewn unto you by the said —, and there view and appraise all and every the said goods and chattels; being first sworn on the Holy Evangelists of Almighty God, to make a true and perfect inventory and appraisement thereof, and to cause the same to be returned under your hands, or any three or four of you, to the said —, on or before the — day of — now next ensuing.

Dated the — day of —, Anno Dom. 17 , and in the — year of American Independence.

To
 or any three or four of them.

Ordinary's-Office.

Recorded Book

Page.

No. XX.

Certificate of oath of appraisers.

MEMORANDUM. This — day of —, 17 , personally appeared before me —, esquire, one of the justices assigned to keep the peace in — district, — being — of the appraisers appointed to appraise the goods and chattels of —, deceased; who being duly sworn, made oath, that they would make a just and true appraisement of all and singular the goods and chattels, (ready money only excepted,) of —, deceased; as shall be produced by —, of the estate of the said —, deceased; and that they would return the same certified under their hands unto the said —, within the time prescribed by law.

No. XXI.

Citation.

South-Carolina. }
 Charleston district. } * *By Charles Lining, esquire, ordinary.*

WHEREAS — made suit to me to grant — letters of administration of the estate and effects of —

X x

THESE

* This is taken out on any day in the week, and is read on Sunday: the Friday following it is brought into court at eleven o'clock, and if no caveat is entered, the letters of administration issue of course. The letters of administration are No. 4. which, with the warrant of appraisement No. 2. are recorded in a book. A memorandum thereof is made in the minute book.

THESE are therefore to cite and admonish all and singular the kindred and creditors of the said —, deceased, that they be and appear before me, in the court of ordinary, to be held at Charleston, on Friday next after publication hereof, to shew cause, if any they have, why the said administration should not be granted.

GIVEN under my hand and seal, this — day of —, in the year of our Lord 17 —, and in the — year of American Independence.

PUBLISHED

No. XXII.

Letters of administration.

South-Carolina.
Charleston district.

} By Charles Lining, esquire, ordinary.

To

WHEREAS —, late of —, deceased, lately died intestate, having, whilst — lived, and at the time of — death, divers goods, rights and credits, within the — aforesaid; by means whereof the full disposition and power of granting the administration of all and singular the goods, rights and credits of the said deceased, and also auditing the accounts, calculations and reckonings of the said administration, and a final dismission of the same, to me is manifestly known to belong. I desiring that the goods, rights and credits of the said deceased, may be well and truly administered, converted and disposed of, do hereby grant unto the said —, in whose fidelity, in this behalf, I very much confide, full power, by the tenor of these presents, to administer the goods, rights and credits of the said deceased, which to —, in — life-time, and at the time of — death, did belong; and to ask, levy, recover and receive the same, and to pay the debts in which the deceased stood obliged so far forth as — goods, rights and credits will extend, according to their rate and order of law; being first sworn on the Holy Evangelists of Almighty God, to make a true and perfect inventory thereof, and to exhibit the same into the ordinary's-office, in Charleston, in order to be recorded, on or before the — day of — now next ensuing; and to render a just and true account, calculation and reckoning of the said administration, when thereunto required: And I ordain, depute and constitute you, the said —, administrat— of all and singular the goods, rights and credits of the said deceased.

IN TESTIMONY whereof, I have hereunto set my hand and seal, the — day of —, Anno Domini 17 —, and in the — year of American Independence.

Ordinary's-Office.

Recorded Book

Page.

No.

No. XXIII.

Administration bond, which is entered into by the administrator and two securities upon the return of the citation.

South-Carolina.

KNOW ALL MEN by these presents, that we —, are holden and firmly bound unto C. L. esq; ordinary for the district of Charleston, in the full and just sum of two thousand pounds,* lawful money of this state, to be paid to the said C. L. or to his successors, ordinaries of this district, or their certain attorney or assigns. To which payment well and truly to be made, we bind ourselves, and every of us, our and every of our heirs, executors, and administrators, for the whole, and in the whole, jointly and severally, firmly by these presents. Sealed with our seals, and dated the — day of —, in the year of our Lord one thousand seven hundred and —.

THE CONDITION of this obligation is such, that if the within bounden administrat— of all and singular the goods, chattels and credits of —, deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have, or shall come to the hands, possession, or knowledge of —, the said —, or into the hands or possession of any other person or persons for —, and the same so made, do exhibit, or cause to be exhibited into the ordinary's-office of this district, at or before the — day of — next ensuing. And the same goods, chattels, and credits, and all the other the goods, chattels and credits of the said deceased, at the time of — death, which at any time hereafter shall come to the hands or possession of the said —, or into the hands and possession of any other person or persons for —, do well and truly administer according to law. And further, do make, or cause to be made, a true and just account of — administration, at or before the — day of — next. And all the rest and residue of the said goods, chattels and credits which shall be found remaining on the said administrat— account (the same being first examined and allowed of by the ordinary of this district for the time being) shall deliver and pay unto such person or persons respectively as the said ordinary, by his decree or sentence, pursuant to the true intent and meaning of the statutes and acts of assembly, of force in this state, *for the better settling of intestates' estates*, shall limit and appoint. And if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same to the said ordinary, making request to have it allowed and approved accordingly, if the said — within bounden, being thereunto required, do render and deliver the said letters of administration, approbation of such testament being first had and made, to the said ordinary; then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed and delivered in the presence of

* I have altered this penalty in some cases, and have made it 5, 10, or 15 thousand pounds.

No.

No. XXIV.

Dedimus, directed to any magistrate, to qualify the administrators, and to take their bond, when it is inconvenient for them personally to attend.

South-Carolina.

By

To

I REPOSING especial trust and confidence in your integrity and circumspection, have, and by these presents do give unto you, the said —, full power and authority to administer the usual administration oath unto —, administrat— of all and singular the goods, rights and credits of —, deceased, on the Holy Evangelists of Almighty God, before you to be taken: And also to cause to be executed by the said —, with two sufficient securities, the usual bond given by administrators, which so executed, with your doings in the premises, to return with all convenient speed into the ordinary's-office of this district.

GIVEN under my hand and seal, this — day of —, in the year of our Lord 17 —, and in the — year of American Independence.
Ordinary's-Office.

YOU — do swear, that —, deceased, made no will in so far as you know and believe, and that you will produce, to shew and inform the appraisers that shall be appointed by the ordinary, all and singular the goods and chattels of the said —, deceased, as already have or shall, before the day of making the appraisement, come into your hands, possession or knowledge; and that you will well and truly administer all and singular the goods, chattels, rights and credits of the said deceased, and pay — debts, as far as — estate will extend; and that you will make a true and perfect inventory of all the rights and credits of the said deceased, whether the same be in ready money, judgments, bonds, or other specialties, or notes of hand, together with a list or schedule of the books of accounts of the said deceased, and exhibit, or cause to be exhibited, the said inventory or schedule, together with the appraisement of the said deceased's goods and chattels, certified under the hands of three or more of the appraisers aforesaid, into the ordinary's-office of this district, within the time prescribed by law. *So help you God.*

Sworn before me this — day of —, 17 —.

No. XXV.

Dedimus to prove wills and qualify executors, when they cannot attend personally. Sometimes it issues to prove the will only, and sometimes to qualify one or more executors, and is frequently applied for to qualify such as did not attend the proving of the will.

South-Carolina.

By

To

I REPOSING especial trust and confidence in the integrity, care and circumspection of you the said —, have, and by these presents, do

do give unto you the said —, full power and authority to examine the several witnesses to the last will and testament of —, deceased, upon their several corporal oaths, to be taken on the Holy Evangelists of Almighty God, touching the due execution thereof, according to the form of the statute in that case made and provided; and also to administer the usual oath to the — therein named. And a due return of your doings herein you are to make and give, under your hand and seal, for my approbation or disallowance.

GIVEN under my hand and seal, this — day of —, in the year of our Lord 17 —, and in the — year of American Independence.

Ordinary's-office.

YOU — do swear, that you believe this to be the last will of —, deceased, and that you will produce to shew, and inform the appraisers that shall be appointed by the —, all and singular the goods and chattels of the said —, deceased, as already have or shall, before the day of making the appraisement, come into your hands, possession or knowledge; and that you will well and truly administer all and singular the goods, chattels, rights and credits of the said deceased, and pay — debts and legacies, as far as — estate will extend; and that you will make a true and perfect inventory of all the rights and credits of the said deceased, whether the same be in ready money, judgments, bonds, or other specialties, or notes of hand, together with a list or schedule of the books of accounts of the said deceased, and exhibit, or cause to be exhibited, the said inventory or schedule, together with the appraisement of the said deceased's goods and chattels, certified under the hands of three or more of the appraisers aforesaid, into the ordinary's-office of this district, within the time prescribed by law.
So help you God.

Sworn before me this — day of —, 17 —.

No. XXVI.

Letters of administration with the will annexed.

South-Carolina.

By

ordinary.

To

WHEREAS —, by means whereof the power of granting the administration of the estate and effects of the said —, deceased, to me is manifestly known to belong. And whereas — hath made suit to me to grant — letters of administration of the estate and effects of the said —, deceased, with — will annexed, — I therefore, in consideration of the premises, and that the goods and chattels, rights and credits of the said —, deceased, may be well and truly administered, converted and disposed of, according to law, do hereby give and grant

grant unto the said —, (in whose fidelity, in this behalf, I very much confide) full power and authority, by the tenor of these presents, to administer and faithfully dispose of the goods and chattels, rights and credits of the said —, deceased, according to the effect and tenor of the said will. And first to pay the debts of the said —, deceased, which — did owe at the time of — death; afterwards the legacies contained in, and specified by, the said will, as far as such goods and chattels, rights and credits will thereto extend and the law requires; being first sworn on the Holy Evangelists of Almighty God, to make a true and perfect inventory thereof: And to exhibit the same into the secretary's-office, in order to be recorded, on or before the — day of — next ensuing. And I do ordain, depute and constitute you, the said —, administrator of all and singular the goods and chattels, rights and credits of the said —, deceased, with — will annexed.

GIVEN under my hand and seal, this — day of —, in the year of our Lord one thousand seven hundred and —.

By the ordinary's command.

No. XXVII.

Guardianship bond.

South-Carolina.

KNOW ALL MEN by these presents, that we —, are holden and firmly bound unto —, governor and commander in chief, and ordinary of this state, in the full and just sum of two thousand pounds current money of the said state, to be paid to the said governor and ordinary, or to his successors, governors and ordinaries of the said state. To which payment well and truly to be made and done, we hereby bind ourselves, jointly and severally, our several heirs, executors and administrators, in the whole and for the whole, firmly by these presents. Sealed with our seals, and dated the — day of —, *Anno Domini* 17 —, and in the — year of American Independence.

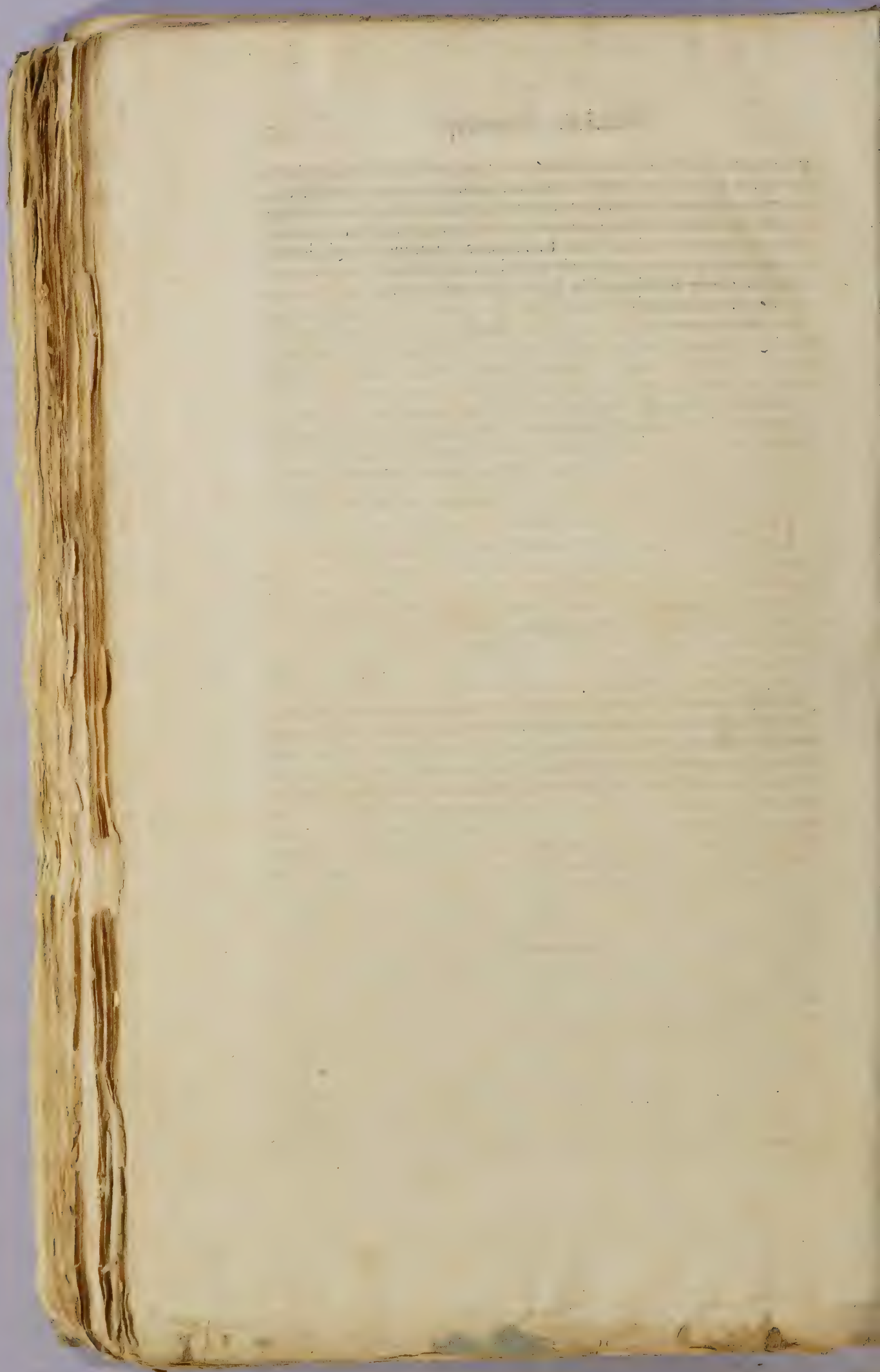
THE CONDITION of this obligation is such, that if the above-bounden — do and shall carefully and handsomely bring up the said —, during — minority and non-age, with necessary meat, drink, washing, lodging, apparel, and learning, according to his degree; and shall, during the time the said — shall be guardian and tutor unto the said —, defend — from hurt of body, loss of goods and lands, so far as in his power lieth; and such portions as shall fall due unto the said —, of the goods and chattels of any person whatsoever, according to the inventory thereof, or by any other ways whatsoever, shall deliver and pay unto the said —, when — shall come to age to receive the same by law: And if it happen that the said — shall die before that time, then if the said — do contract and pay the portion and other rights of the said — to whom the law shall appoint

appoint the same to be paid; or who, by proximity of blood; ought to have it; and shall also render a true and perfect account upon the tuition to him granted, when thereunto required; and also save and keep harmless the above-named governor and ordinary, and all other officers and ministers under him, for or by reason of granting the said letters of guardianship; that then the above obligation to be void and of none effect, or else to remain and be in full force and virtue.

Sealed and delivered

in the presence of

FINIS.



South-Carolina District, to wit.

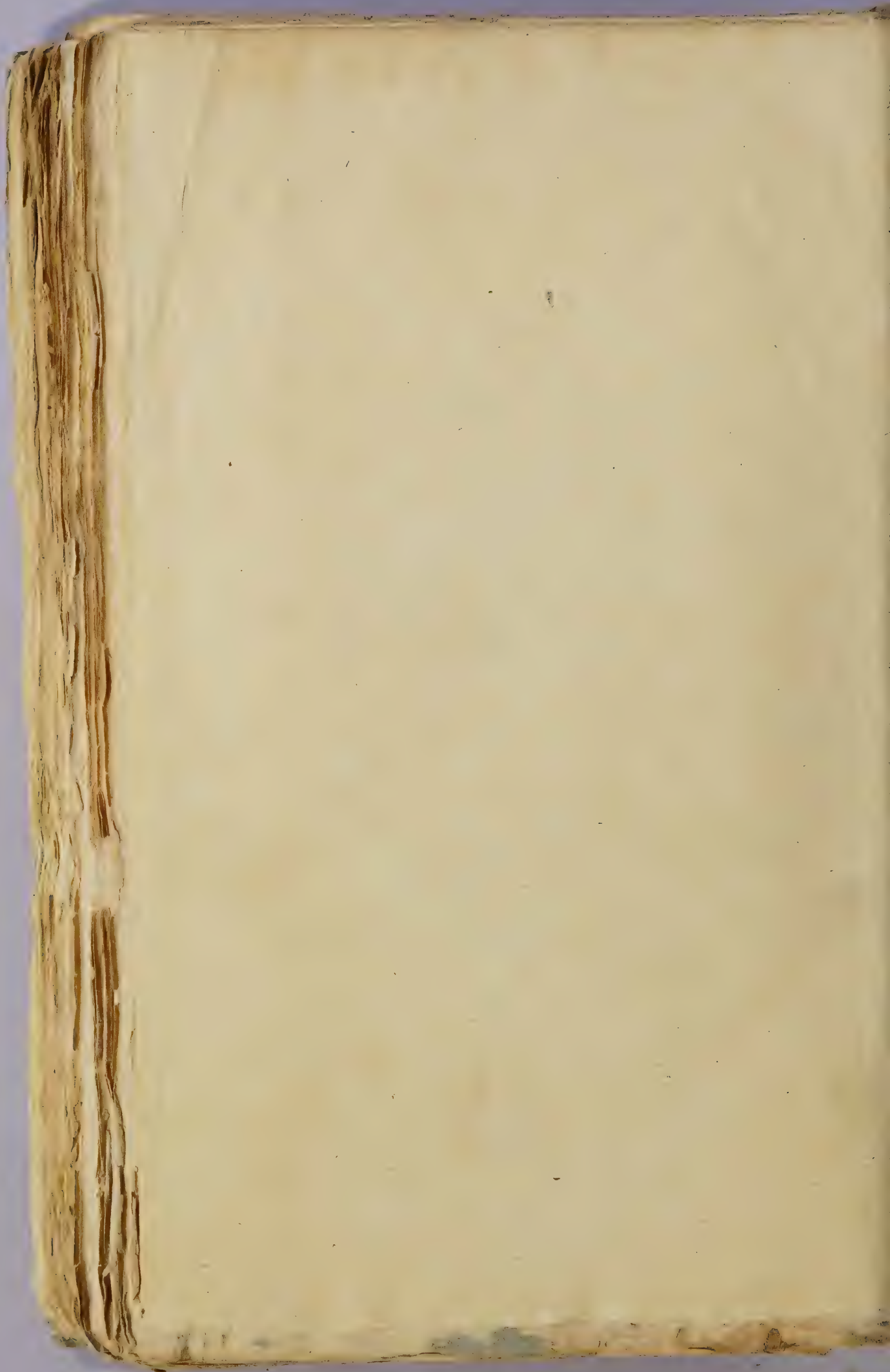
BE it remembered, that on the twentieth day of January, in the year of our Lord one thousand seven hundred and ninety-eight, and in the twenty-second year of the Independence of the United States of America, the Honourable John Faucherauld Grimké, one of the Associate Judges of the State of South-Carolina, hath deposited in this office, the title of a book, the right whereof he claims as Author, in the following words, to wit: "The Duty of Executors and Administrators, &c. by J. F. Grimké."

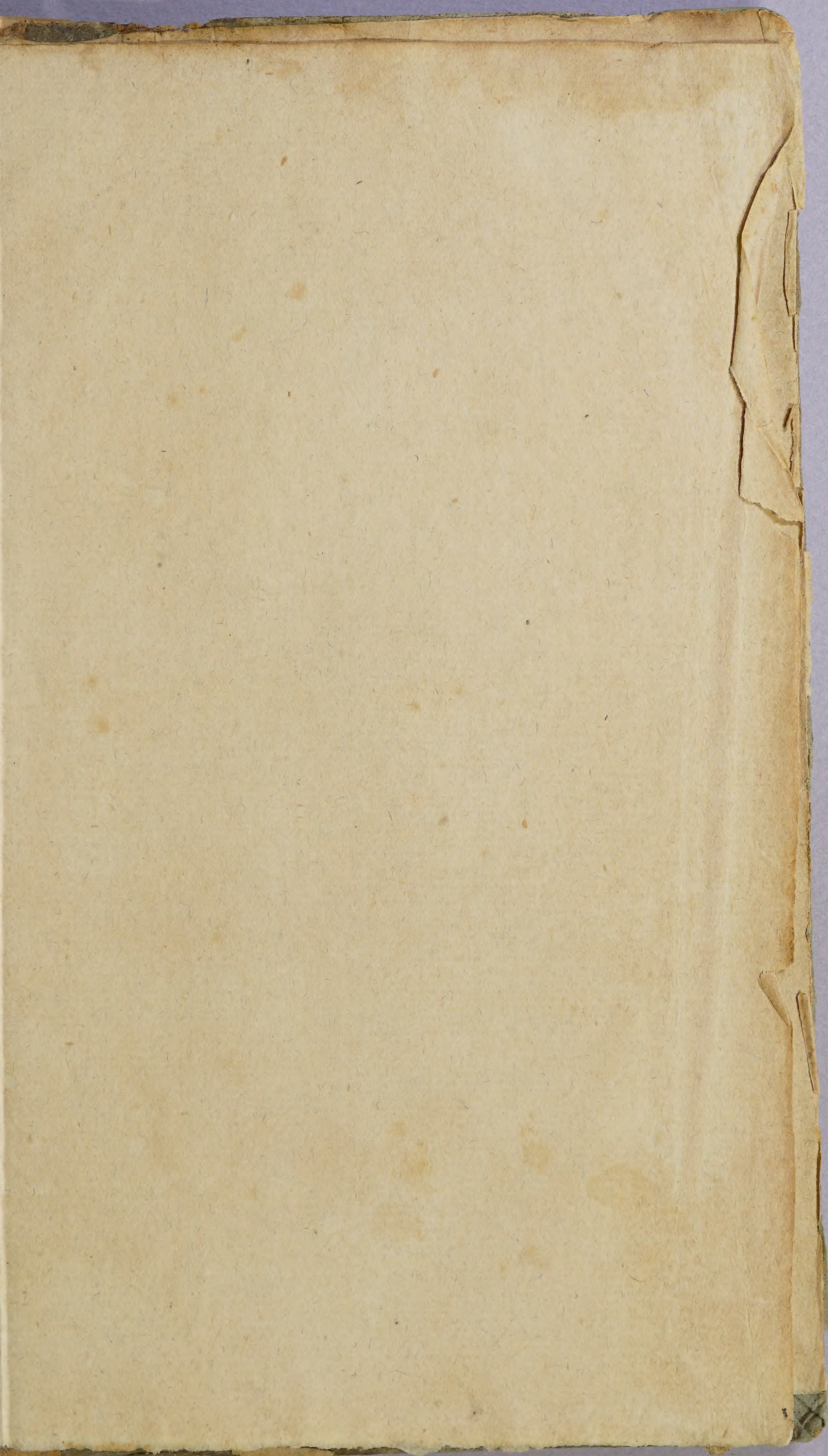
In conformity to the Act of the United States, entitled "An Act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the proprietors and authors of such copies, during the times therein mentioned."

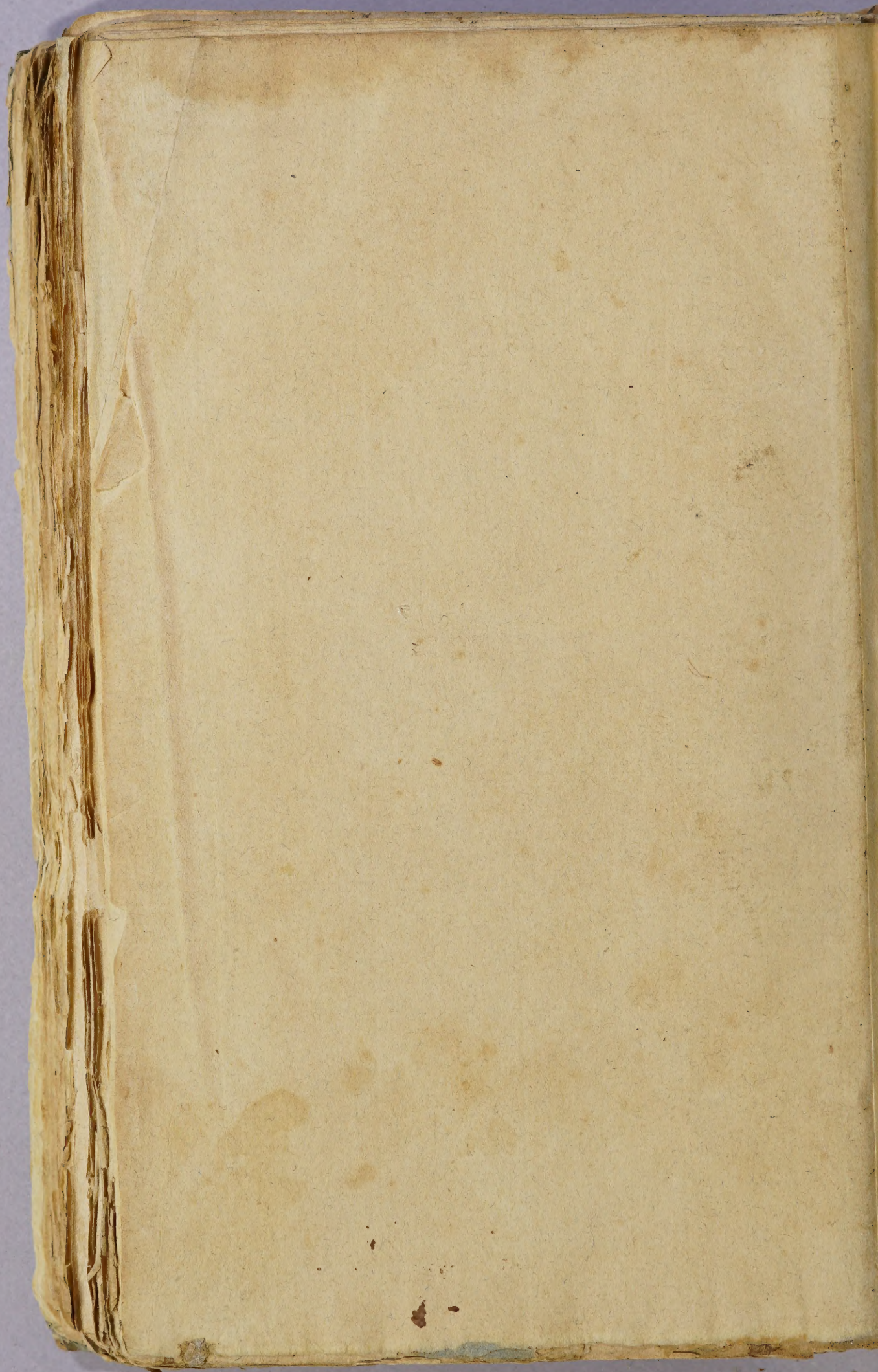
THOMAS HALL, Clerk South-Carolina District.

ERRATA.

Page	44, line 32, for 490	read	491.
	52, line 8, for appointed	....	appointee.
	54, line 42, for preson	....	person.
	144, line 34, for when	....	where.
	150, line 2, for time	....	day.
	179, line 48, for if	....	of.
	185, line 12, for in	....	of.
	192, line 32, for administration	....	administrator.
	199, two clauses twice printed.		
	226, line 28, for and	....	or.
	237, line 28, the word "the" is omitted.		
	239, line 20, for Shell's	read	Shelly's.
	248, line 6, for found	....	sound.
	265, line 9, for have	....	carry.
	266, line 32, for of	....	if.
	282, line 5, for partitions	....	portions.
	286, line 5, for each	....	such.
	291, line 7, for adjudged	....	judged.
	293, line 6, for a	....	no.
	294, line 17, for and	....	or.
	310, line 32, for arbitrary	....	arbitration.
	317, line 13, there ought to be a dash or line through the words "one half of," to shew that they had been struck out of the will.		
	319, line 7, for there	read	thereof.
	321, line 9, the word "of" is left out.		
	328, line 7 in note, for so	read	also.







D 794
G 863d

John

